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**Legal transplants: appropriate tools for the reform of
Afghanistan's criminal law framework? An evaluation
of the Interim Criminal Procedure Code 2004 and the
Counter Narcotics Law 2005**

John Jupp

**A Thesis submitted to the University of Sussex for the Degree of Doctor of
Philosophy (D.Phil)**

SCHOOL OF LAW, UNIVERSITY OF SUSSEX

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Contents

| | Page |
|---|-------------|
| Declaration and Copyright | i |
| Acknowledgements | ii |
| Abbreviations | iii-iv |
| Abstract | v |
| Chapter 1: Introduction | |
| Introduction | 1 |
| 1.1 The Centrality of Criminal Justice to Rule of Law Promotion | 5 |
| 1.2 Meeting the Need for Legislative Reform | 8 |
| 1.3 The Significance of and Motivations for this Study | 18 |
| 1.4 Definitions and Concepts | 22 |
| 1.5 Organisation of the Thesis | 24 |
| 1.6 Methodology | 25 |
| Chapter 2: Legal Transplants: Justification and Evaluation | |
| Introduction | 35 |
| Section 2.1: Transplant Justification: The ICPC and the CNL | 36 |
| 2.1.1 Legal Transplants as Mechanisms for Criminal Justice Reform | 36 |
| 2.1.2 Motivations for Transplanting Law | 38 |
| 2.1.3 Motivation and Post-Intervention Criminal Law Reform | 42 |
| 2.1.4 Theoretical Perspectives on Legal Transplants as Tools for Legal Change | 44 |
| 2.1.5 Theoretical Lessons | 48 |
| Section 2.2: Transplant Evaluation: Developing an Evaluative Test For the ICPC and the CNL | 51 |
| 2.2.1 The Conditions of Success | 51 |
| 2.2.2 Evaluations of criminal law reform | 54 |
| 2.2.3 An evaluative test for the ICPC and the CNL | 57 |
| Conclusion | 64 |
| Chapter 3: Criminal Justice in Afghanistan: Context, Reform And Contemporary Realities | |
| Introduction | 66 |
| Section 3.1: Early Post-intervention reform | 67 |
| Section 3.2: Legal Traditions and Criminal Justice in Afghanistan | 68 |
| 3.2.1 Customary approaches to criminal justice | 69 |

| | | |
|--------------|---|-----|
| 3.2.1.1 | Customary approaches: procedural issues | 70 |
| 3.2.1.2 | Customary approaches: substantive issues | 71 |
| 3.2.2 | Islamic approaches to criminal justice | 73 |
| 3.2.2.1 | Islamic approaches: substantive issues | 74 |
| 3.2.2.2 | Islamic approaches: procedural issues | 75 |
| Section 3.3: | The Development of the Afghan State Criminal Justice System | 78 |
| Section 3.4: | Criminal Justice Reform 2001-2011 | 89 |
| 3.4.1 | Establishing the criminal law framework | 89 |
| 3.4.2 | Applicable state substantive criminal law | 90 |
| 3.4.3 | Applicable state criminal procedural law | 92 |
| 3.4.4 | Development, Reform, Training and Capacity Building | 94 |
| Section 3.5: | Challenges to the State Criminal Justice System And Constraints on Transplant Reception | 103 |
| 3.5.1 | Cultural dynamics and the legitimacy of the state criminal justice system | 104 |
| 3.5.2 | Narcotics and organised crime | 108 |
| 3.5.3 | Corruption | 111 |
| 3.5.4 | Insurgency and insecurity | 112 |
| | Conclusion | 113 |

Chapter 4: An Evaluation of the Interim Criminal Procedure Code 2004

| | | |
|--------------|---|-----|
| | Introduction | 116 |
| Section 4.1: | The ICPC: Provisions and procedures | 116 |
| Section 4.2: | Reasons for the development of the ICPC | 120 |
| Section 4.3: | The ICPC as a legal transplant | 121 |
| Section 4.4: | Evaluating the ICPC | 124 |
| 4.4.1 | The Application of the ICPC | 124 |
| 4.4.2 | The extent to which the ICPC is considered meaningful and appropriate | 140 |
| 4.4.3 | ICPC: the motivations for transplantation and their impact on its reception | 151 |
| 4.4.4 | The extent to which the ICPC has achieved its objectives | 156 |
| | Conclusion | 159 |

Chapter 5: An Evaluation of the Counter Narcotics Law 2005

| | | |
|--------------|--|-----|
| | Introduction | 164 |
| Section 5.1: | The Counter Narcotics Law 2005 | 164 |
| Section 5.2: | Reasons for the development of the CNL | 166 |

| | | |
|---------------------|---|-----|
| Section 5.3: | The CNL as a legal transplant | 169 |
| Section 5.4: | Evaluating the CNL | 171 |
| 5.4.1 | The Application of the CNL | 171 |
| 5.4.2 | The extent to which the CNL is considered meaningful and appropriate | 183 |
| 5.4.3 | CNL: the motivations for legal transplantation and their impact on its reception | 189 |
| 5.4.4 | The extent to which the CNL has achieved its objectives | 193 |
| | Conclusion | 201 |
| Chapter 6: | Conclusion | 208 |
| Bibliography | | 222 |
| Appendices | | |
| | Table and Figures | 245 |
| Appendix 1: | Afghanistan: society, conflict and context to 2001 and constitutional and legal institutional reform under the Bonn Agreement | 257 |
| Appendix 2: | Customary justice – <i>nanawati</i> , warlord interference and <i>baad</i> practices | 264 |
| Appendix 3: | The Tokyo Conference 2002, Lead Nation Designation and Constitutional Reform | 266 |
| Appendix 4: | Confessions and the ICPC | 274 |
| Appendix 5: | The Italian Code of Criminal Procedure 1988 | 275 |
| Appendix 6: | Afghanistan's Emerging Opium Economy: 1924-2005 | 276 |
| Appendix 7: | Interim Criminal Procedure Code 2004 | |
| Appendix 8: | Counter Narcotics Law 2005 | |

Declaration and Copyright

I, John Jupp declare that this thesis is my original work and, whether in the same or different form, has not been presented and will not be presented to any other University for a similar or any other degree award.

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John Jupp

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Abbreviations

| | |
|----------|--|
| ABA | American Bar Association |
| AGO | Attorneys General Office |
| AI | Amnesty International |
| AIA | Afghan Interim Authority |
| AIBA | Afghan Independent Bar Association |
| AIHRC | Afghan Independent Human Rights Commission |
| ANAP | Afghan National Auxiliary Police |
| ANDS | Afghanistan National Development Strategy |
| ANP | Afghan National Police |
| AREU | Afghanistan Research and Evaluation Unit |
| ARoLP | Afghan Rule of Law Project |
| ARTF | Afghanistan Reconstruction Trust Fund |
| ASOP | Afghan Social Outreach Programme |
| CEELI | Central European and Eurasian Law Initiative |
| CIC | Code d’Instruction Criminelle |
| CIDA | Canadian International Development Agency |
| CIVPOL | International Civilian Police |
| CJTF | Criminal Justice Task Force |
| CNL | Counter Narcotics Law 2005 |
| CNT | Counter Narcotics Tribunal |
| CNTF | Counter Narcotics Trust Fund |
| DFID | Department for International Development |
| EU | European Union |
| I-ANDS | Interim Afghanistan National Development Strategy |
| ICCPR | International Covenant on Civil and Political Rights 1966 |
| ICLT | International Coordination for Legal Training |
| ICG | International Crisis Group |
| ICGJR | International Coordination Group for Justice Reform |
| ICPC | Interim Criminal Procedure Code 2004 |
| IDLO | International Development Law Organisation |
| IJPO | Italian Justice Project Office |
| ILAC | International Legal Assistance Consortium |
| ILF | International Legal Foundation |
| IMF | International Monetary Fund |
| INL | Bureau of International Narcotics and Law Enforcement Affairs (US) |
| INTERFET | International Force for East Timor |
| ISISC | International Institute of Higher Studies in Criminal Sciences |
| JCMB | Joint Coordination and Monitoring Board |
| JRC | Judicial Reform Commission |
| JSCG | Justice Sector Consultative Group |
| JSSP | Justice Sector Support Programme |
| LALO | Legal Aid Organisation of Afghanistan |
| MOJ | Ministry of Justice |
| NATO | North Atlantic Treaty Organisation |
| NDCS | National Drug Control Strategy |
| NGO | Non-Governmental Organisation |
| NJP | National Justice Programme |
| NJSS | National Justice Sector Strategy |
| PRT | Provincial Reconstruction Team |
| ROL | Rule of law |

| | |
|--------|---|
| TARCET | Targeted Anti-Trafficking Regional Communication, Expertise, Training |
| UK | United Kingdom |
| UNAMA | United Nations Assistance Mission in Afghanistan |
| UNDP | United Nations Development Programme |
| UNDPKO | United Nations Department of Peacekeeping Operations |
| UNMIK | United Nations Assistance Mission in Kosovo |
| UNODC | United Nations Office on Drugs and Crime |
| UNOPS | United Nations Office for Project Services |
| UNTAET | United Nations Transitional Administration in East Timor |
| UNTAC | United Nations Transitional Authority in Cambodia |
| US | United States |
| USAID | United States Agency for International Development |
| USIP | United States Institute of Peace |
| WCLRF | Women and Children Legal Research Foundation |
| WB | World Bank |

UNIVERSITY OF SUSSEX

JOHN JUPP

A Thesis submitted for the Degree of Doctor of Philosophy (D.Phil)

Legal transplants as tools for the reform of Afghanistan's criminal law framework. An evaluation of the Interim Criminal Procedure Code 2004 and the Counter Narcotics Law 2005

Summary of the Thesis

The criminal law frameworks of countries that have been the subject of international peacekeeping operations and military interventions often reveal an urgent requirement for reform. Destabilised by conflict, existing frameworks may be discriminatory and inconsistent with international human rights and due process standards. New law may be imperative to promote the development of fair and effective justice systems, rule of law and transitions from conflict to peace. While the transplantation of readily-available law can be an appealing solution a fundamental concern for legislators is whether it represents a reasonable and effective mechanism for developing vital post-intervention criminal law reform. This thesis addresses this issue by examining the Interim Criminal Procedure Code 2004 and the Counter Narcotics Law 2005, two laws developed by legal transplantation in Afghanistan, the most recent example of a country where the international community is engaged in post-intervention criminal law reform. It does this by firstly developing a new evaluative test developed from an examination of theoretical perspectives on transplant feasibility. It then applies this test using quantitative data supported by original qualitative research from interviews with senior Afghan and international legal personnel. It finds that neither law has been successful. Their transplanted content and the processes of transplantation have reduced the extent to which they have been accepted and achieved their objectives and have increased their potential to be 'lethal' transplants capable of promoting injustices, generating destabilising discontent and moderating rule of law promotion. This study questions the assumption that it should always be reasonable to develop post-intervention criminal law by means of legal transplantation. The reasonableness of relying on legal transplantation will depend on the sensitivity with which it is employed, requiring knowledge of legal transplant feasibility, local history and legal traditions and the prior application of the proposed evaluative test to assess potential receptivity.

1 Introduction

Introduction

Establishing the rule of law has become an imperative concern for agencies engaged in peacekeeping operations and international development assistance programmes in countries seeking to effect transitions from conflict to peace. Regarded as a universal tool for developing a range of ideals including economic expansion, democratic governance, law and order, security and adherence to international standards of human rights, it has been prescribed by foreign policymakers engaged in its promotion as 'a panacea for the ills of countries in transition.'¹

Its significance for transitional countries grew during the 1970's when extensive law and development programmes were undertaken by foreign donors, academics from the United States (US) and agencies engaged in African and Latin American countries to assist socio-political transitions from autocratic and repressive rule to liberal democracies built on US political and legal ideals.² Its popularity was later maintained during the 1990's when the collapse of socialist systems under the former Soviet Union triggered a surge of further rule of law assistance programmes in countries in eastern Europe and the Balkans designed to augment legislative, constitutional and judicial transitions in accordance with western liberal ideologies.

In the same decade a series of ethnic conflicts, human rights crises and civil wars in countries such as Bosnia, Rwanda, Kosovo, and East Timor resulted in international interventions motivated by humanitarian rationales. These fostered a significant investment in post-interventionist programmes designed to assist transitions from conflict to peace by establishing rule of law.³ Between 1990 and 2006 the World Bank (WB) supported 330 rule of law projects costing more than \$2.9 billion.⁴ During the same period two-thirds of the United Nations (UN) 60 peacekeeping operations

¹ Carothers, T. 'The Rule of Law Revival,' (1998) 77(2) *Foreign Affairs*, 95-106, p.95.

² Mertus, J. 'From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society' (1998-1999) 14 *American University International Law Review*, 1335-1389

³ I refer to the situation in Afghanistan in this paper as 'post-intervention' and 'seeking to emerge from conflict' rather than 'post-conflict' which is normally associated with the cessation of organised, armed struggle and the signing of peace agreements, neither of which have yet occurred since 2001. See Call C.T. *Constructing Justice and Security after War*, United States Institute of Peace Press, Washington D.C. (2007), p379

⁴ Trubek, D. (2006) 'The Rule of Law in Development Assistance: Past, Present and Future' in Trubek, D. and Santos, A. (eds.) *The New Law and Economic Development: A Critical Appraisal* (2006), Cambridge and New York: Cambridge University Press, p.74

included rule of law development programmes.⁵ In the 1990's alone the UN engaged in 15 separate peace-building operations undertaken following armed conflicts, most of which led to post-intervention criminal justice activities.⁶ It participated in negotiations to create a new police force in El Salvador in 1992⁷ and oversaw the organisation and training of civilian police forces in Somalia in 1994⁸ and Sierra Leone in 1998.⁹ It also facilitated police training programmes in Bosnia-Herzegovina in 1997.¹⁰ In Cambodia its mandate was enlarged beyond police support programmes to include control for law enforcement and establishing law and order with human rights protections.¹¹ In Rwanda and former Yugoslavia it established international war crimes tribunals that led to the creation of a new International Criminal Court. Later, in 1999 it was designated with full legislative and executive authority during assistance missions in East Timor and Kosovo and tasked with the reform of their national criminal justice systems.¹²

The growth in UN peacekeeping operations during the 1990's resulted in post-intervention societies becoming the main focus of rule of law promotion programmes,¹³ a trend sustained in the 2000's following US-led military interventions in Iraq and Afghanistan.¹⁴ The international community,¹⁵ and the UN in particular, approached the immense challenges presented by these post-interventionist states, often characterised by damaged infrastructure, barely functioning institutions, traumatised societies with

⁵ O'Connor, V. 'Rule of Law and Human Rights Protections through Criminal Law Reform: Model Codes for Post-Conflict Criminal Justice (2006) *International Peacekeeping*, 13 (4), 517-530, p.521

⁶ During the 1990's the UN was engaged in peacekeeping operations in Namibia (1989-1990), Nicaragua (1989-1992), Angola (1991), Cambodia (1991), El Salvador (1991), Mozambique (1992), Liberia (1993), Rwanda (1993), Bosnia (1995), Croatia (1995), Guatemala (1997), Democratic Republic of Congo (1999), East Timor (1999), Kosovo (1999) and Sierra Leone (1999); see Weiss et al, *The Oxford Handbook on the United Nations*, Oxford University Press (2007), p. 407

⁷ Call, note 3, p.37.

⁸ S/RES/897 (1994)

⁹ S/RES/1181 (1998)

¹⁰ S/RES/1144 (1997)

¹¹ Details of various relevant Agreements available at

http://www.usip.org/files/file/resources/collections/peace_agreements/agree_comppol_10231991.pdf

¹² S/RES/1272 (1999) for East Timor; S/RES/1244 for Kosovo; Call, note 3, p.17; Rausch, C. and O'Connor, V. 'Model Codes: Laying the Foundations of the Rule of Law,' in Hurwitz, A. and Huang, R. (eds.) *Civil War and the Rule of Law. Security, Development, Human Rights* (2008), Lynne Rienner Publishers, Inc 115-138, p.116

¹³ There has been considerable academic scholarship on rule of law and state-building following international intervention. In addition to Call, note 3, see Dobbins, J. Jones, S.G., Rathmell, A., Steele, B., Teltschik, R. and Timilsina, A. *The UN's Role in Nation-Building: From the Congo to Iraq* Santa Monica, CA: RAND Corporation (2005); Dobbins, J., Jones, S.G., Crane, K. and De Grasse, B.C. *The Beginner's Guide to Nation-Building*, Santa Monica, CA: RAND Corporation (2007); Ghani, A. and Lockhart, C. *Fixing Failed States: A Framework for Rebuilding and Fractured World*, New York: Oxford University Press (2008); Rausch, C. *Combating Serious Crimes in Postconflict Societies. A Handbook for Policymakers and Practitioners*, United States Institute of Peace Press, Washington D.C. (2006); Stromseth, J., Wippman, D. and Brooks, R. *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge University Press (2006); Van Hippel, K. *Democracy by Force: US Military Intervention in the Post-Cold War Era*, Cambridge: Cambridge University Press (2000)

¹⁴ Stromseth et al, note 13, p.65

¹⁵ I adopt the term 'international community' in this thesis to refer to western states, the US and NATO powers.

critical human development needs and atomised security and political control, by endorsing the emerging orthodoxy that establishing the rule of law is key to promoting successful reform¹⁶ or, more significantly, according to Carothers, 'a solution to the world's troubles,'¹⁷ apparently based, Tamanaha suggests, on the premise that it 'is good for everyone.'¹⁸ Reflecting the increasingly high regard that the UN had for rule of law promotion in conflict states Lord Ashdown, the former High Representative for the UN, acknowledged with regard to Bosnia and Herzegovina that:

'we should have put the establishment of rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts. We should do well to reflect on this as we formulate our plans for Afghanistan, and, perhaps, Iraq. This position has been widely supported by the UN with the rule of law being acclaimed as lying at the heart of [its] work in rebuilding war-torn countries.'¹⁹

Similarly, in 2003 the UN Under-Secretary for Peacekeeping Operations confirmed that the UN regarded rule of law the 'sine qua non for the sustainable resolution of conflict in the rebuilding of secure, orderly and humane societies,'²⁰ and in 2004 the UN Secretary-General urged member states in to 'restore and extend the rule of law throughout the world'²¹ because '[I]t is by re-introducing the rule of law, and confidence in its impartial application, that we can hope to resuscitate societies shattered by conflict.'²²

Notwithstanding the growing consensus amongst the UN and the international community that rule of law is an important device for building peace and security in post-interventionist countries there remains no internationally accepted agreement on the meaning of the concept.²³ While this remains the case, it represents an unsatisfactory pitfall for rule of law reform efforts as lack of clarity over this issue may

¹⁶ Samuels, K. *Rule of Law Reform in Post-Conflict Countries. Operational Initiatives and Lessons Learnt*, Social Development Papers. Conflict Prevention and Reconstruction. Paper No. 37 (October 2006) available at <http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2006>, p.3

¹⁷ Carothers, note 1, p. 98

¹⁸ Tamanaha, B.Z. *On the Rule of Law: History, Politics, Theory*, Cambridge and New York: Cambridge University Press (2004), p.1

¹⁹ Lord Ashdown, P. 'What I Learned in Bosnia', Press Office, Office of the High Representative 08.10.2002 in 'Establishing the Rule of Law in Iraq' (2002) USIP Special Report 104, available at <https://www.usip.org/pubs/specialreports/sr104.html>

²⁰ Press Release SC/7884 of 4835 Meeting of the Security Council 30.09.2003. Guehenno, J-M, reporting to the Security Council as it considered 'Justice and the Rule of Law: the role of the United Nations,' available at <http://www.un.org/News/Press/docs/2003/sc7884.doc.htm>

²¹ UN Secretary-General's address to the General Assembly, 21.09.2004 available at <http://www.un.org/apps/sg/sgstats.asp?nid=1088>

²² *ibid*

²³ Belton, R. K. 'Competing Definitions of the Rule of Law,' in Carothers, T. (ed.) *Promoting the Rule of Law: In Search of Knowledge* (2006), Carnegie Endowment For International Peace, p.31-75, p.32; Mani, R. *Beyond Retribution: Seeking Justice in the Shadows of War*, Blackwell Publishing Co. (2002), p.26

encourage conflicting goals, values and targets during promotion programmes and confusion over what is actually being promoted. Moreover, recipient countries of donor assistance should be entitled to a clear understanding of the requirements they are expected to fulfil during rule of law reform agendas as well as the consequences of breaching them.²⁴

Numerous definitions have been suggested, the content of which vary depending on the political, legal and social context in which it is being examined.²⁵ Different organisations engaged in rule of law programmes in post-conflict states have developed their own definitions, adding to the confusion.²⁶ These range from minimalist conceptions which view rule of law as equally applicable, predictable legal rules capable of resolving disputes²⁷ to maximalist interpretations which allow for fairness and observance of human rights standards.²⁸ Practitioners have also sought to define it with reference to the attributes rule of law institutions should be aspiring to or the legal goals they should seek to achieve.²⁹ The UN has attempted to minimise the confusion by suggesting a broad, ends-based definition which holds it out to be:

‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights, norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’³⁰

This guidance emphasises the technical requirements of ensuring that there are applicable laws, fairly enforced and consistent with international standards.³¹ However, as Kuovo points out ‘for a rule of law-based society to function, it is not only necessary

²⁴ Sannerholm, R.Z. *In Search of a User Manual: Promoting the Rule of Law in Unruly Lands* (2007) available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1068781, p.5

²⁵ *ibid*, p.6

²⁶ Dakolias et al, *Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency*, Working Paper 31.07.2002, available at http://www.wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187511&siteName=WDS&entityID=000094946_0211260401346; UNDP, *Building Modernity and Tradition: Rule of Law and the Search for Justice* (2007) available at <http://hdr.undp.org/en/reports/national/asiathepacific/afghanistan/nhdr2007.pdf>, p.37

²⁷ Carothers, note 1, p.96

²⁸ Mani, note 23, p.28

²⁹ Belton, R.K. ‘Competing Definitions of the Rule of Law: Implications for Practitioners,’ Paper No.55, (January 2005) Carnegie Endowment for International Peace available at <http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf>

³⁰ United Nations, ‘Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,’ U.N. Doc. 5/2004/616 (23.08.2004) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

³¹ Belton, note 29, p.27; Dobbins, *Beginner’s Guide*, note 13, p.73.

that laws are adopted and applied, they also have to enjoy public legitimacy and reflect shared values.³²

Stromseth's approach to rule of law promotion offers an attractive solution to dealing with the complex issues that the concept of rule of law involves. It advocates that rule of law reform requires an understanding of how local institutions are related, how they operate as a system and the political influences on reform (*systemic approach*); a clear perception of strategic goals of reform, taking into account not only legal and institutional reform but also relevant cross-cutting issues such as gender discrimination and informal approaches which may contribute to or constrain rule of law promotion (*ends-based and strategic approach*); and a desire to constructively build on processes, laws and institutions that already exist, recognising their appeal and limitations and how they might be adapted in ways that ensure legitimacy (*adaptive and dynamic approach*).³³ This 'synergistic' model offers a useful framework guideline for rule of law development in states seeking to emerge from conflict as it acknowledges that with regard to the crucial issues of legitimacy and shared values, in addition to formal codified law, existing justice mechanisms that incorporate local customary and religious norms may be significant.

1.1 The Centrality of Criminal Justice to Rule of Law Promotion

On a practical level rule of law is inextricably linked to a functioning criminal justice system normally including institutions such as courts, the police, prosecution, judiciary and the government ministries that support them as well as legislation that guides their behaviour.³⁴ Criminal justice is acknowledged as one of the key areas underpinning rule of law development in post-intervention states. According to the UN, 'effective criminal justice systems can only be developed based on the rule of law and ... the rule of law itself requires the protection of effective criminal justice measures.'³⁵

³² Kuovo, S. *State-building and rule of law: lessons from Afghanistan?* NDC Forum Paper Series (Rome: NATO Defence College, 2009) available at <http://www.ndc.nato.int>, p.16

³³ Stromseth et al, note 13, p.81-84

³⁴ Strohmeyer, H. 'Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor,' (2001) 24(1), *University of New South Wales Law Journal*, 171-182, p.171; Centre for Humanitarian Dialogue Report, *Assistance to Justice and the rule of law in Afghanistan. A strategic analysis*, (February 2004) available at <http://www.hdcentre.org/publications/assistance-justice-and-rule-law-afghanistan-strategic-analysis>, p. 12

³⁵ Economic and Social Council, Res 2005/21; UNODC, *The Criminal Justice Assessment Toolkit*, United Nations, New York (2006) available at http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/CJAT_Toolkit_full_version.pdf, p.v

Post-intervention countries seeking transitions from conflict to peace are often typified by challenges to law and order and increased criminal activity capable of threatening efforts to establish peace and security.³⁶ East Timor experienced a rise in all types of crime following stabilization of the territory by the International Force in East Timor (INTERFET).³⁷ Homicides tripled in El Salvador within three years of the 1992 ceasefire³⁸ and increased in Guatemala by 20% within two years of the end of its civil war in 1996.³⁹ The cessation of conflict and civil war does not entail an end to violence and crime. Rather it changes their nature and tends to lead to increased criminal activity, which can represent serious challenges to the legitimacy of a new government and any attempts it may make to promote access to justice.⁴⁰

To counter the threat of increased criminality in countries recovering from conflict and provide effective criminal justice systems, thus enhancing rule of law, the UN has suggested that a number of key tasks must be undertaken. Derived from experience gained in enforcing domestic criminal law,⁴¹ training,⁴² performance monitoring⁴³ and the reconstruction of criminal justice systems⁴⁴ during multi-dimensional peacekeeping operations, these include strengthening national police forces, improving correctional facilities and enhancing the capacity of defence and prosecution lawyers and the judiciary.⁴⁵

³⁶ Rausch, note 13, p.3; Darby. J. *The Effects of Violence on Peace Processes*, USIP, Washington D.C. (2001); p.63

³⁷ Call, note 3, p.378

³⁸ *ibid*, p. 377

³⁹ *ibid*, p.378

⁴⁰ Ashdown, P. *International Humanitarian Law, Justice and Reconciliation in a Changing World*, The Eighth Hauser Lecture on Humanitarian Law, New York, 03.03.2004 available at <http://www.nyuhr.org/docs/lordpaddyashdown.pdf>

⁴¹ A UN military force (KFOR) enforced domestic criminal law in Kosovo for a year before handing over authority to an international civilian police force (CIVPOL) who then assumed an executive policing role in Kosovo, S/RES1244 (1999), para 9(d); Capt. Gwaltney, A.L. 'Law and Order in Kosovo: A Look at Criminal Justice During the First Year of Operation Joint Guardian,' in Wentz, L. *Lessons from Kosovo: The KFOR Experience*, CCRP Publication Series (2002); p.233 available at http://www.dodccrp.org/events/12th_ICCRTS/CD/library/html/pdf/Wentz_Kosovo.pdf

⁴² For example, S/RES/997 (1995), para 3(d) for Rwanda available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/173/26/PDF/N9517326.pdf?OpenElement>; S/RES/1063 (1996), para 2 for Haiti available at <http://www1.umn.edu/humanrts/resolutions/SC96/1063SC96.html>; S/RES/1181 (1998), para 8(a) for Sierra Leone available at

http://unipsil.unmissions.org/portals/unipsil/media/documents/scres/SCRes_1181_1998.pdf and S/RES/1590 (2005), para 4 (viii) for Sudan available at http://www.un.org/Docs/sc/unsc_resolutions05.htm

⁴³ For example, the Comprehensive Agreement on Human Rights (1994), 29.03.1994, para 19 for Guatemala available at <http://www.c-r.org/our-work/accord/guatemala/human-rights-agreement.php>; S/RES/1509 (2003), para 3(a) for Liberia available at

<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Liberia%20SRES1509.pdf> and S/RES/1545 (2004), para 7 for Burundi available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/BurundiSRES1545.pdf>

⁴⁴ For example, S/RES/897 (1994), para 2(d) for Somalia available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/065/62/PDF/N9406562.pdf?OpenElement>; S/RES/1509 (2003), para 3(a) for Liberia and S/RES/1590 (2005), para 4 (viii) for Sudan

⁴⁵ UN, note 30, para 12

In addition, the UN recommends that criminal justice systems must be supported by adequate legal frameworks consisting of modern laws.⁴⁶ The legal framework of a state incorporates its domestic laws and those international treaties that are binding on it.⁴⁷ According to the UN's Department of Peacekeeping Operations 'a national legal framework or penal code, consonant with international human rights norms and standards, is the basis for establishing the rule of law and is the starting point for effective law enforcement and criminal justice.'⁴⁸ This view is widely shared by international donor agencies involved in rule of law reform programmes in societies emerging from conflict. The United States Institute of Peace (USIP) refers to the legal framework as 'the backbone of a criminal justice system.'⁴⁹

What, however, should the criminal law framework consist of? In East Timor, it was felt that it should comprise 'rules of criminal procedure (ie, on arrest and detention) and substantive criminal law, as well as rules governing the activities of the police...consistent with recognised international standards.'⁵⁰ Ideally, therefore, post-intervention states should have domestic procedural and substantive criminal laws that provide a 'box set' of provisions containing definitions for criminal activity and procedures for the investigation and prosecution of criminal offences which conform to international human rights expectations and which may provide additional 'modern' measures allowing for such matters as the improved safety and privacy of witnesses and covert surveillance techniques. Crucially, domestic laws are required that set out the powers of and limitations on judges, police and prosecutors; that promote fair trial standards, due process and adequate international human rights protections in adherence to international treaties;⁵¹ and that provide guarantees such as the availability of legal representation, respect for rights to liberty and protection from unlawful and arbitrary detention.

Guidelines prepared by international experts for international organisations involved in rule of law reform in post-interventionist states suggest that a comprehensive needs assessment should be conducted at the early stage of international involvement to examine the extent to which the legal framework of the criminal justice system

⁴⁶ *ibid*, para 30; O'Connor, note 5, p.521-522

⁴⁷ Rausch, note 13, p.42

⁴⁸ United Nations, *Handbook on UN Multidimensional Peacekeeping Operations*, Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, (2003), New York available at www.peacekeepingbestpractices.unlb.org/.../Handbook%20on%20UN%20PKOs.pdf, p.95

⁴⁹ Rausch, note 13, p.39

⁵⁰ Strohmeyer, note 34, p.181

⁵¹ For example the International Covenant on Civil and Political Rights (ICCPR), adopted by General Assembly resolution 2200A, 16 December 1966, which came into force on 23 March 1976 available at <http://www.ohchr.org/english/law/ccpr.htm>

correlates with the 'box set' ideal of necessary measures and provisions.⁵² Dobbins, a former U.S. envoy to Afghanistan, advocates that the review and establishment of interim criminal laws should be 'an indispensable initial step for international actors'⁵³ as part of best practice procedure for promoting rule of law in post-conflict societies. Reviews should involve the assessment not only of substantive and procedural applicable law but also of international treaties ratified by the state which compel it to ensure and protect fair trial, due process and human rights⁵⁴ and oblige it to criminalise certain activities, including organised crime, terrorism and illicit narcotic production and trafficking.⁵⁵

1.2 Meeting the Need for Legislative Reform

Reviews of the criminal justice systems of post-interventionist countries often reveal an urgent requirement for the reform of domestic law. Stromseth confirms that the 'reform of criminal law and procedure is often particularly urgent.'⁵⁶ Similarly, a 2004 UN report cautioned that in post-intervention settings 'legislative frameworks often show accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards.'⁵⁷ Domestic criminal law may fall short of sufficiently criminalising activities, allowing them to be committed with impunity, weakening rule of law promotion. The 1976 Liberian criminal code was insufficient to deal with human trafficking prevalent following the cessation of violence in 2003.⁵⁸ Similarly, the Angolan 1886 Penal Code and the 1925 Haitian criminal code were insufficient to deal with contemporary local and transnational criminal realities and in need of 'modernisation.'⁵⁹ In Angola money laundering and corruption became endemic because they were not recognised as criminal activity in any domestic law.⁶⁰ The UN assistance mission in East Timor revoked a number of laws from the still applicable Indonesian Criminal Code for being discriminatory to women and contrary to international human rights standards.

⁵² See Rausch, note 13. According to Rausch 'ascertaining the existing legal framework should be a key element of any assessment intended to guide the development of a strategy to combat serious crimes in a post conflict state,' p.42.

⁵³ Dobbins, *Beginner's Guide*, note 13, p. 77

⁵⁴ For example, the UN ICCPR (1966) and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

⁵⁵ For example, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), the UN Convention against Transnational Organised Crime (2004), the UN International Convention for the Suppression of the Financing of Terrorism (2002)

⁵⁶ Stromseth, note 13, p.247

⁵⁷ UN, note 30, para 27

⁵⁸ Rausch, note 13, p.41-42

⁵⁹ *ibid*

⁶⁰ *ibid*

Moreover, criminal law in Kosovo required reform as the still applicable laws of the former Yugoslavian regime, which had been used as a tool of repression and discrimination against the Kosovar Albanian population, would have been politically repugnant to that section of the local population following the cessation of hostilities. The applicable laws also needed modernising to criminalise human trafficking, extend provisions in relation to terrorism and increase penalties for organised criminal activity.⁶¹

Post-intervention countries, it is apparent, require substantial programmes of legislative reform, including reform of procedural and substantive criminal law. Notably, the United Nations Assistance Mission in Kosovo (UNMIK) passed 257 regulations between 1999 and 2004, many of which were designed to reform Kosovo's criminal justice system.⁶² Similarly, the United Nations Transitional Administration in East Timor (UNTAET) passed 71 regulations during its four-year mandate, during which it undertook a comprehensive amendment of East Timor's criminal procedure.⁶³ These extensive programmes are a consequence of reviews by international actors of applicable legislation and criminal law frameworks through the lens of international human rights standards. They are also, however, indicative of a trend of opportunism normally perpetuated by international actors geared towards changing the legislative status quo in post-interventionist states to conform with international expectations for the promotion of rule of law. Stromseth notes that 'a window of opportunity for significant change exists after intervention.'⁶⁴ Similarly, Carlson has observed that 'the most opportune moment in which to work for change is in the immediate post-conflict period.'⁶⁵

Because new law is likely to be required in transitional states they have become test sites for international actors seeking ways to promote change through legislative reform.⁶⁶ This has become a growth industry, particularly in the last two decades, which

⁶¹ *ibid*

⁶² See UNMIK Regulations and Administrative Directions, Official Gazette, available at <http://www.unmikonline.org/regulations/index.htm>.

⁶³ For example, *On Transitional Rules of Criminal Procedure*, UNTAET Reg. No. 2000/30 (25 September 2000); *On the Establishment of a Code of Military Discipline for the Defence Force of East Timor*, UNTAET Reg. 2001/12 (20 July 2001); *On the Establishment of an Authority for the Regulation of Telecommunications in East Timor*, UNTAET Reg. No. 2001/15 (21 July 2001); and *On the Establishment of a Legal Aid Service in East Timor*, UNTAET Reg. 2001/24 (5 September 2001)

⁶⁴ Stromseth et al, note 13, p.188

⁶⁵ Carlson, S.N. *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study*, (March 2006), UN Department of Peacekeeping Operations, available at <http://www.unrol.org/files/Legal%20and%20judicial%20RoL%20work%20in%20multi%20dimensional%20OpKping%20operations%20Lessons%20Learned%20Study.pdf>; p.2

⁶⁶ Call, note 3, p.17

have witnessed a huge expansion of international interest in supporting and developing opportunities for social and legal transition and the promotion of rule of law in post-intervention societies. In addition to the UN, foreign assistance agencies such as the Department for International Development (DFID) and Germany's Agency for Technical Assistance (GTZ) have provided technical support for legislative drafting programmes. Similar initiatives have been undertaken by non-governmental organisations (NGOs) such as the American Bar Association Central European and Eurasian Law Initiative (ABA/CEELI), the International Development Law Organisation (IDLO) and the International Legal Assistance Consortium (ILAC), all of which have developed reform programmes and provided actors offering technical expertise in drafting legislative frameworks.⁶⁷

The assumption by the international community of a central role in legislative reform in these states is a consequence of its custodianship of a new rights framework, developed from transformations in human rights law and international criminal and humanitarian law since World War Two (WWII), which has provided international actors with a perceived legitimacy in determining the normative content of required laws.⁶⁸ Nevertheless, this legitimacy, and indeed the legitimacy of international interventions and consequent legislative reform programmes to establish rule of law is likely to be measured against the effectiveness of the laws and frameworks that are subsequently introduced. While the interventions of the 1990's and 2000's were ostensibly motivated by humanitarian and national as well as international security concerns their legitimacy to local populations, judged against criticisms of invasion, imperialism and colonialism, can be dependent on the success of resulting new legislative reform that promotes rule of law.

This legitimacy risks being seriously undermined when mistakes are made. UNMIK, was criticised for failing to take 'a coherent approach to criminal justice reform' to the extent that it put 'at risk the transition as a whole.'⁶⁹ Its delay in identifying an acceptable body of criminal law led to violations of human rights norms and impairment to the credibility and legitimacy of international efforts to promote rule of law in Kosovo.⁷⁰ Care, then, is needed in contemplating how criminal law reform should

⁶⁷ Tolbert, D. and Solomon, A. 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies,' (2006) 19 *Harvard Human Rights Journal*, 29-62, p.55-56

⁶⁸ Boon, K. 'Legislative Reform in Post-Conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers,' (2005) 50 *McGill Law Journal*, 285-326, p. 299

⁶⁹ Tolbert et al, note 67, p.51

⁷⁰ Betts W.S., Carlson, S.N. and Gisvold, G., 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law,' (2000-2001) 22, *Michigan Journal of International Law*, 371-389, p.375

properly be conducted and received by local populations, requiring reflection on the most effective means of introducing new criminal legislation considered necessary to promote legal change.

One solution is to amend existing applicable criminal law to ensure its compliance with international standards of human rights.⁷¹ Recycling pre-existing criminal legislation may be an attractive solution. It is cost-efficient and whole or partial reliance on tried and tested law may promote legitimacy for a new government amongst the local population.⁷² Difficulties can be encountered, however, when identifying existing criminal law, leading to confusion in application, a problem encountered in Afghanistan following 23 years of civil war and the destruction of legal texts by the Taliban regime. It may also be problematic locating suitable criminal codes capable of local acceptance. UNMIK's stipulation that the Serbian Criminal Code was to be applied in Kosovo was rejected by the Kosovar judiciary, forcing changes to the law. Similarly, in East Timor the Timorese were dissatisfied with UNTAET's insistence on applying pre-existing Indonesian law.⁷³ Applicable law may also be completely inadequate for domestic requirements, as was the case in Cambodia where the criminal law at the time of the establishment of the United Nations Transitional Authority in Cambodia (UNTAC) consisted of only one decree containing 12 brief articles.⁷⁴

If local criminal law cannot be recycled and amended new law may be required. How, though, should this be done? Law reformers may take the view that the most effective means of promoting legal change is to transplant law into the domestic criminal legal framework of the post-interventionist country – to employ legal transplants. The term 'legal transplant' is a metaphor for the act of one country creating by means of borrowing⁷⁵, adopting,⁷⁶ copying⁷⁷ or imposing⁷⁸ a legal institution⁷⁹, norm⁸⁰ or rule⁸¹

⁷¹ Dobbins, note 13

⁷² Sannerholm, note 24, p. 8

⁷³ O'Connor, note 5, p. 523

⁷⁴ Donovan, D. A., 'Cambodia: Building a Legal System from Scratch' (1993) 27 *The International Lawyer*, 445-454, p.448

⁷⁵ Cotterrell, R. 'Is There a Logic of Legal Transplants' in Nelken, D. and Feest, J, (eds) *Adapting Legal Cultures*, (2001) Hart Publishing, p. 71-92; Cotterrell refers to the concept of legal transplantation as 'the transferring or borrowing of law between legal systems,' p.71

⁷⁶ Garoupa N. and Ogus, A. 'Conflict or Credibility: A Strategic Interpretation of Legal Transplants' *The Journal of Legal Studies* June (2006) 35, 339-360 who define legal transplants as the 'unilateral adoption of legal norms from other jurisdictions,' p.341

⁷⁷ Kanda H. and Milhaupt, C.J. 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 *American Journal of Comparative Law*, 887-902. Kanda and Milhaupt define legal transplants as 'a body of law or individual legal rule that was copied from a law or rule already in force in another country, rather than developed by the local legal community,' p.887

⁷⁸ Friedman, L. 'Some Comments on Cotterrell and Legal Transplants' in Nelken et al, note 75, 93-98. Friedman suggests that 'a lot of 'transplanting' has occurred throughout history by way of conquest and colonisation'; p. 94

that has been successfully established in another country and incorporating – or literally *transplanting* it, in a similar manner to a surgical transplant – directly into the domestic legal system.⁸² Legal transplantation, referred to by Beckstrom as an ‘old exercise,’⁸³ is certainly an established means of creating criminal law and a number of international experts have advocated their use for post-intervention reform. Dobbins endorses the transplantation of readily applicable criminal law and procedure as part of a ‘*quick-start package*’ in the initial phases of post-conflict operations,⁸⁴ a proposal supported by the UN in its Report of the Panel on United Nations Peace Operations (the *Brahimi Report*),⁸⁵ which recommended the deployment of ‘quick response’ legal teams and the development of a set of interim criminal codes which could have temporary application in generic post-conflict environments pending a process of fuller reform.⁸⁶ In response to this, the Model Codes for Post Conflict Criminal Justice⁸⁷ have been developed comprising a compendium of draft laws and procedures for key elements of the criminal justice system – the courts, police and prisons – available for immediate transplantation in post-intervention states, an innovation that suggests that the way forward for criminal law reform in these environments is the transplantation of readily available foreign-designed codes.⁸⁸

⁷⁹ Miller, J.M. ‘A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process,’ (2003) 51 *American Journal of Comparative Law*, 839-886. Miller describes legal transplants as ‘the movement of laws and legal institutions between states,’ p.839

⁸⁰ Garoupa & Ogus, note 76, p.341

⁸¹ Watson, A. *Legal Transplants*, 2nd ed., Athens, Ga.:University of Georgia Press (1993); Watson referred to legal transplantation as ‘the moving of a rule...from one country to another, or from one people to another,’ p.21

⁸² It is not the intention of this thesis to become embroiled in the terminological debate on the most appropriate metaphor or means of describing the processes which promote legal change. I employ the term legal transplant as a generic metaphor to refer to the phenomenon of borrowing or copying rules and provisions from foreign legal sources to develop new law. I use the words ‘implanting,’ ‘importing,’ ‘borrowing,’ ‘adoption,’ and ‘legal transplantation’ to refer to the same phenomenon. For terminology generally see Wise, E. ‘The Transplant of Legal Patterns,’ (1990) 38 *American Journal of Comparative Law (Supplement)* 1 and Nelken, D ‘Towards a Sociology of Legal Adaptation’ in Nelken et al, note 75, p.15-20

⁸³ Beckstrom, J.H. ‘Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia’ (1973) 21, *American Journal of Comparative Law*, 557-583, p. 557

⁸⁴ Dobbins, *Beginner’s Guide*, note 13, p. 77

⁸⁵ UN, ‘Report of the Panel on United Nations Peace Operations: Comprehensive Review of the Whole Question of Peacekeeping Operations in All Its Aspects’ (Brahimi Report) U.N. Doc. A/55/305-S/2000/809 (21 August 2000); O’Connor, note 5, p.523

⁸⁶ *ibid*, *Brahimi Report*, para. 83

⁸⁷ The Codes were developed from a project spearheaded by the USIP and the Irish Centre for Human Rights in cooperation with the Office of the High Commissioner for Human Rights and the UNODC. They are divided between three volumes: volume I consists of a draft penal code, the Model Criminal Code; volume II a draft procedure code, the Model Code of Criminal Procedure; and volume III, the Model Detention Code and the Model Police Powers Act. The criminal procedure code contains more than 225 articles covering a range of issues from the investigation of crimes to trial and appeal proceedings as well as additional matters such as witness protection. See Rausch, note 13, p.123; Stromseth et al, note 13, p.198

⁸⁸ O’Connor, V. ‘Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States: Model Codes for Post Conflict Criminal Justice As A Tool Of Assistance,’ (2005),16, *Criminal Law Forum*, 231-255, p.247-255

It is to be hoped that the Codes emerge as a useful guide for legislative drafters when addressing the reform of applicable criminal law in post-intervention situations. It is not stretching the imagination too much, however, to suggest that the easy availability of the Codes may encourage them to tailor their methodology for promoting legislative reform by selecting transplantable models from this standard menu of laws, embracing a universalistic 'one size fits all' philosophy.⁸⁹ As Mani has observed, 'if you only have a hammer it is very tempting to see every problem as a nail, rather than developing different tools to deal with different problems.'⁹⁰

This approach to law reform would risk being construed as a neutral and technical process, detached from any social or political consequences.⁹¹ It presupposes that newly introduced formal criminal laws will reliably lead to an improved societal commitment to the formal criminal justice processes they promote, rendering as unnecessary any consideration of cultural issues that could ultimately prove to be vital to the prospects of any new criminal laws achieving the objectives for which they are enacted. Brooks argues that 'rule of law promotion efforts stumble when they come up against countervailing cultural commitments that are resistant to clumsy and formalistic efforts to change them.'⁹² According to Brooks, international actors who introduce new law into post-conflict states face a limited prospect of their new laws creating or changing societal norms unless they are aligned to the cultural traditions of the society into which they are placed. International law reformers should 'know the culture at issue and take it seriously,'⁹³ counsel supported by Krygier and Mason who maintain that 'if institutions and rules are to endure and take on strength, then they owe their solidity to understandings and expectations – many of them borne by and grounded in cultural traditions within which the institutions and rules take on meaning and significance.'⁹⁴

These positions caution against a formalistic and technocratic approach to rule of law reform and argue for one which is dependent on a full understanding of the cultural norms of the society into which new law is to be introduced. These norms, it is maintained, will directly affect the reception of any new law. This was evidently the

⁸⁹ Carothers, T. (1999), '*Aiding Democracy Abroad: The Learning Curve*,' Carnegie Endowment for International Peace, Washington D.C.

⁹⁰ Mani, note 23, p.72

⁹¹ Drumbl, M.A. 'Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan' (2003-2004) 42, *Columbia Journal of Transnational Law*, 349-390, p.364

⁹² Brooks, R.E., 'The New Imperialism: Violence, Norms and the 'Rule of Law,' (2002-2003) 101, *Michigan Law Review*, 2275-2340, p.2322

⁹³ *ibid*, p.2334

⁹⁴ Krygier M. and Mason, W. *Violence, development and the rule of law*, University of New South Wales (2008), Paper 8 available at <http://law.bepress.com/unswllps/flrps08/art8>, p.16

case in Somalia where the UN's declaration that the criminal laws in use prior to its mission would be applicable provoked protest amongst the legal community in the north of the country who regarded the existing Penal Code as a tool of oppression under Siad Barre's former regime. Similarly, in Kosovo several Kosovo-Albanian judges refused to apply the law following the UN's declaration that the laws in force prior to the UN mission were applicable *mutatis mutandis*, as they considered them repugnant to their own community.⁹⁵

If the success of new law, including transplanted law, depends on its close alignment with the cultural traditions of the country into which it is introduced, this suggests that law reformers should proceed to introduce new law only when they are sensitive to local social, political and legal issues, including existing legal traditions.⁹⁶ In the context of criminal law these may include not only cultural interpretations of formal criminal justice – state and constitutional law - but also local use and reliance upon religious law and informal justice mechanisms,⁹⁷ which often operate parallel to formal systems in developing countries and states seeking to emerge from conflict.⁹⁸ In Kosovo, for example, judicial institutions were established by the Albanian population during the Milosevic regime which led to the creation of parallel municipal courts, ruled by Kosovo Serbs, following the UN intervention.⁹⁹ Similarly, in Somalia traditional customary law (*xheer*) applied by tribal elders and *shari'a* courts operate as functioning dispute resolution mechanisms distinct from any formal legal institutions.¹⁰⁰

International criminal justice reformers have been cautious in their approach towards existing local justice mechanisms and procedures during reform programmes in some post-intervention countries, not least because some traditional justice practices are considered anathema to internationally acceptable standards. Informal justice may be

⁹⁵ Sannerholm, note 24, p.5

⁹⁶ I adopt Merryman's definition of legal traditions as 'a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and in the polity, about the proper organisation and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and thought. The legal tradition relates the legal system to the culture of which it is a partial expression;' Merryman J.H., Clark, D.S., & Haley, J.O. *The civil law tradition: Europe, Latin America and East Asia* Charlottesville: Michie Co. (1994)

⁹⁷ Huang, R. *Securing The Rule of Law: Assessing International Strategies for Post-Conflict Criminal Justice*, Policy Paper. The Security-Development Nexus Program, International Peace Academy (2005), p.1-16 available at www.ipacademy.org/Programs/Research/ProgReseSecDev_Pub.htm, p. 14

⁹⁸ Chirayath L., Sage C., and Woolcock M., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, Washington, D.C.: World Bank (July 2005) available at http://www.sitesources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf. Chirayath notes that customary systems 'are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa,' p.3

⁹⁹ Organisation for Security and Cooperation in Europe (OSCE) Mission in Kosovo, *Parallel Structures in Kosovo 2006-2007*, (Pristina: OMIK April 2007), available at http://www.osce.org/documents/html/pdftohtml/23925_en.pdf.html, p.15

¹⁰⁰ Samuels, note 16, p.18

dispensed by leaders who have not been selected by democratic processes, whose rule may be unfettered and whose decisions are immune from processes of transparency and accountability. They may furthermore be influenced by local powerholders, susceptible to bribes, and endorse practices that discriminate against ethnic groups and women. In Guatemala, concerns of this nature led the UN to conclude that traditional justice mechanisms were incompatible with the western liberal ideals they were trying to install.¹⁰¹

Nevertheless, local structures of justice may be advantageous to post-intervention reform efforts. They may be more accessible to the local population, helping to fill any legal vacuums during the initial stages of reform while formal justice institutions are being built and personnel trained. International reformers may achieve better results if they assess these systems and their potential for complementing the reforms they intend to introduce.¹⁰² Notably, Chad and Zaire have both retained justice systems that combine customary with modern centrally administered courts. Similarly, the benefit of having a customary system in place was demonstrated in Rwanda where the government made use of the traditional *gacaca* process and amended it to produce a locally legitimate process for trying genocide suspects.¹⁰³ Mani maintains that international law reformers must consider whether law reform can be facilitated by enhancing 'legal pluralism' of this nature that blends western with locally acceptable practices.¹⁰⁴

The experiences of Chad, Zaire and Rwanda suggest that customary law can be a dynamic and flexible instrument for promoting access to justice that law reformers of post-conflict criminal justice should understand and consider. Indeed, to ignore customary justice practices may damage the legitimacy of international innovations in criminal law reform, particularly if new formal law and institutions are regarded as threats to the legitimacy of established cultural justice norms. New legislation which conflicts with traditional justice approaches may be more likely to be locally perceived as a foreign imposition with colonial designs, undermining the reception of the law and the legitimacy of general rule of law efforts.¹⁰⁵

¹⁰¹ Call, note 3, p.401

¹⁰² *ibid*, p.406

¹⁰³ Vogler, R. *A World View of Criminal Justice*, Ashgate Publishing Company (2005); p.257-263

¹⁰⁴ Mani, note 23, p.82

¹⁰⁵ Rausch et al, note 12, p.120

The perception of imposition, which is a challenge to the legitimacy of internationally-led law reform, can be heightened when new law is regarded by local populations as 'foreign' and created by international actors who have been brought in temporarily to provide their expertise, but whose conceptions of 'successful' law reform are not tied to its alignment with local legal traditions. New law is, nevertheless, less likely to be regarded as imposed when local actors are involved at the drafting stages.¹⁰⁶ However, the dependence by post-interventionist states on foreign assistance can create an unequal relationship between international donors and local officials that can translate into the way in which legislative reform is carried out. Local concerns may be marginalised against larger international requirements to ensure compatibility with acceptable procedures and human rights standards and in the legal vacuum that often prevails, typified by damaged infrastructure and limited personnel, laws drafted by international 'experts' are perhaps less likely to be subject to close local scrutiny and more likely to be enacted without local challenge. In this environment of reduced local accountability international legislators can approach legislative reform in a way that measures success with reference to the goal of enactment rather than effectiveness and use. According to Holmes,

'foreign legal consultants and experts report the greatest rate of success (that is, their advice is swallowed whole and the laws they draft are actually passed by parliaments) in societies where law is virtually unenforced. This is natural...where laws are not enforced, legislative drafting can be donated as an amusement park for foreign lawyers (I once met a lawyer sitting in the lobby of the IMF who boasted: 'I wrote the Civil Code of Afghanistan.')

¹⁰⁷

Perhaps in response to earlier legislative reform shortcomings the UN's 2004 Rule of Law and Transitional Justice in Conflict and Post Conflict States (*Rule of Law*) report¹⁰⁸ made recommendations quite at odds with those in the *Brahimi* Report, advocating moving from dependence on 'foreign experts, foreign models and foreign-conceived solutions'¹⁰⁹ to reform supporting 'national assessments, national needs and aspirations.'¹¹⁰ Now, reformers were advised to 'eschew one-size-fits-all formulas and the importation of foreign models.'¹¹¹ A report by the UN Secretary-General in 2009 confirmed this approach by underlining 'the imperative of national ownership' to

¹⁰⁶ Tolbert et al, note 67, p.53

¹⁰⁷ Holmes, S. 'Can Foreign Aid Promote the Rule of Law.' (1999) 8, 4 *East European Constitutional Review* 68-74, p.73

¹⁰⁸ UN, note 30

¹⁰⁹ *ibid*, para. 15

¹¹⁰ *ibid*, at Summary

¹¹¹ *ibid*

peacebuilding efforts in the aftermath of conflict.¹¹² This appears to augment a movement by the UN away from support for staple-on legal transplantation as a means of reforming post-intervention criminal law frameworks to a process more in tune with local contextual issues and legal traditions. In recognition of this change of approach the Model Codes, originally designed to ‘create a skeletal emergency body of law’ for post-conflict states, were held out by their authors as ‘sources of law for inspiration’ rather than imposition.¹¹³ Guidance for the Codes now stresses that they are ‘not intended to be used in whole or to be parachuted into a post-conflict state as a quick-fix solution or as an emergency law.’¹¹⁴ They are, in essence, not designed to be imposed by external actors but are available as a ‘pick and mix’ package for legislators to use in order to select required legislation.

This change of approach by the UN, evidenced by the contrasting recommendations in the *Brahimi* and *Rule of Law* reports, is indicative of a wider shift in policy towards its role as a peace-keeping actor in post-intervention states which has seen it move from leading reform, as in the case of Kosovo and East Timor, to facilitating it, as has been its stance more recently in Afghanistan. However, the *volte face* of the UN in its approach towards rule of law and criminal justice reform also reflects a lack of certainty amongst the principle actors involved in post-conflict reconstruction about the best means of bringing about effective and successful legal change. It is estimated that 39% of states emerging from conflict experience a return to conflict in the first 5 years and that another 32% return to it in the succeeding 5 years.¹¹⁵ Rule of law programmes do not come with a guarantee of success. In spite of all the numerous attempts by international organisations to promote rule of law and develop new legal frameworks since the 1990’s there remains insufficient knowledge and understanding about how legal change can effectively be facilitated.¹¹⁶ As Carothers has observed:

‘Aid providers know what endpoint they would like to help countries achieve – the Western style, rule-oriented systems they know from their own countries. Yet, they do not really know how countries that do not have such systems

¹¹² United Nations, *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, A/63/881-S/2009/304 (11 June 2009) available at http://www.humansecuritygateway.com/documents/UNSC_A63881S2009304_RepSecGen_PeacebuildingImmediateAftermathConflict.pdf, p.4

¹¹³ Rausch, note 12, p.124

¹¹⁴ *ibid*

¹¹⁵ Samuels, note 16, p.23

¹¹⁶ *ibid*, p.18

attain them. That is to say they do not know what the process of change consists of and how it might be brought about.¹¹⁷

1.3 The Significance of and Motivations for this Study

This problem assumes a fundamental significance in the context of Afghanistan where the international community and the UN have been engaged in substantial programmes to reform the justice system and strengthen the rule of law since the US-led defeat of the Taliban regime in 2001. The political future of Afghanistan is a vital and important question on the geo-political world stage, a focal point for the US and United Kingdom (UK) 'war on terror' and a testing ground for the foreign policies of international countries, particularly those that supported its invasion in 2001. The stakes could perhaps not be higher than for the North Atlantic Treaty Organisation (NATO), involved in its first deployment outside Europe and whose future legitimacy may depend on the success of security control and international reform efforts in Afghanistan.¹¹⁸

With reconstruction efforts now into their tenth year, Afghanistan remains important as a litmus test for the efficacy of international assistance efforts in societies seeking to achieve transitions from conflict to sustainable peace. This transition depends on establishing rule of law and the creation of an effective criminal justice system. Afghanistan therefore represents the most recent example of a country where the international community are actively engaged in post-intervention legislative reform of the criminal law framework as part of an agenda to promote and enhance rule of law.

The UN response to the situation in Afghanistan was to highlight once again the importance of rule of law, declaring that its re-establishment was 'essential to the peace process.'¹¹⁹ There was a consensus amongst the international community that constructing a functioning justice system would be central to achieving this ideal. At a conference in Rome in 2002 numerous international countries pledged their support for the reconstruction of the judicial system and agreed that:

¹¹⁷ Carothers, T. *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Working Papers, No. 34 (January 2003) available at <http://carnegieendowment.org/publications/index.cfm?fa=view&id=1169>; p.9

¹¹⁸ Kuovo, note 32, p.21

¹¹⁹ UN, *Report of the Secretary General on the situation in Afghanistan and its implications for international peace and security*, A/57/850-S/2003/754 (23 July 2003) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/431/43/PDF/N0343143.pdf?OpenElement>

'the development of a fair and effective justice system in Afghanistan is a vital requirement to meet the needs of the Afghan people and to protect their human rights...an effective justice system is essential not only for the successful development of Afghan society as a whole, but also to achieve lasting peace and security in Afghanistan.'¹²⁰

At the time neither human rights nor opportunities for human development were guaranteed for the vast majority of Afghans. The Afghan economy had collapsed. Traditional trade routes were destroyed and the agricultural market had crashed, reducing food production by as much as 50%.¹²¹ Human development opportunities were ranked amongst the lowest in the world.¹²² Akin to the situations in South Africa, Guatemala and El Salvador, criminal activity increased following the cessation of the civil war and the transition from Taliban rule to democratic government in 2001. Poppy cultivation and opium production also expanded rapidly, establishing Afghanistan as a world centre for the trafficking of illicit narcotics.¹²³

Against this background the reform of the justice system, including the criminal justice system, presented a formidable challenge to international actors and Afghan stakeholders. Following years of unrest since the Soviet invasion in 1979 the formal justice sector lacked institutional infrastructure, material and human resources. A report in January 2003 confirmed that 'Afghanistan's legal system has collapsed. Never strong to begin with, it has been destroyed by 23 years of conflict and misrule.'¹²⁴ Law reformers encountered a criminal justice system influenced by plural legal traditions consisting of Islamic religious law, customary law and state legislation. An informal system of criminal justice, adhering to local customary and tribal practices as well as Islamic religious law, existed alongside a formal system derived from constitutional and legislative reform and developed by various state rulers and regimes. There was, however, a complete lack of clarity over the nature and applicability of existing formal law. According to the USIP the state justice system consisted of a 'patchwork of overlapping laws [and] elements of different types of legal systems, and an incoherent collection of law enforcement...structures.'¹²⁵

¹²⁰ Amnesty International, *Afghanistan. Re-establishing the Rule of Law*, (14 August 2003) available at www.amnesty.org/en/library/info/ASA11/021/2003, p.8

¹²¹ Summary Report, *Millennium Development Goals Islamic Country of Afghanistan Country Report* (2005), available at <http://www.andg.gov.af>, p.25

¹²² Afghanistan is ranked 174th out of 178 countries on a global human development index. See UNDP, note 26, p.18

¹²³ Discussed in detail in Chapter 5

¹²⁴ International Crisis Group, *Afghanistan: Judicial Reform and Transitional Justice*, Asia Report No. 45, (28 January 2003), Kabul/Brussels: available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/045%20-%20Afghanistan%20>, p.i

¹²⁵ USIP, *Establishing the Rule of Law in Afghanistan Special Report 117* (March 2004), p.9 available at <http://www.usip.org/pubs/specialreports/sr117.pdf>, p.3

Legislators faced practical questions such as how new positive law guaranteeing international human rights and criminal law standards could be reconciled with Afghanistan's cultural and legal traditions? As long ago as 1845 a general serving in the Anglo-Indian army in Afghanistan warned that:

‘there is no nation in the world more turbulent and less under subjection; the difficulties in rendering them submissive to a code of just laws would be almost insurmountable...they hate all governments which introduce law and order into a country, or enter into peace with their neighbours; to do so in their eyes is an attack upon their rights.’¹²⁶

Could, then, applicable criminal law be relied upon and purged of provisions contrary to international human rights standards? Or if new law had to be introduced should it be transplanted from accepted western templates?

New positive codes were assessed as required by international donors in order to fill the legal vacuum that existed in respect of Afghanistan's criminal law framework and promote rule of law. With substantial international assistance new laws were consequently introduced, two of the most significant of which were the Interim Criminal Procedure Code 2004 (ICPC), which provided new procedural rules governing the arrest, detention and trial of criminal suspects and the Counter Narcotics Law 2005 (CNL) which established new powers and procedures designed to prevent the cultivation, production and trafficking of illicit narcotic drugs. The ICPC precedes the UN *Rule of Law* report and the CNL was drafted after it was published. Both of these laws are legal transplants. The legislators who contributed to drafting them chose to rely heavily on borrowed foreign legal principles and rules and transplant them into domestic Afghan state law. They assumed that transplanting law was the most effective method for promoting legal change to strengthen Afghanistan's criminal law framework in an effort to enhance rule of law.

This thesis evaluates these two transplanted laws in order to address a central question: was it reasonable for legislators to rely on legal transplantation to develop the ICPC and the CNL when seeking to reform Afghanistan's criminal law framework in order to promote rule of law? In order to consider this matter, this study:

¹²⁶ Ferrier, J.P. *History of the Afghans*, Lahore: Sang-e-Meel Publications (2002); p.287 [originally published London: J. Murray (1858)]

1. explores legal transplants as tools for legal change and assesses 'transplant justification,' namely the motivations for adopting them generally and in the context of post-intervention criminal law reform;
2. considers theoretical perspectives on the value of legal transplants and develops an original evaluative test for application to the transplanted ICPC and CNL, based on an historical examination of transplant evaluations and the experience of criminal law reform involving legal transplantation;
3. examines criminal justice in Afghanistan and the plural legal traditions that influence it, the history of state justice reform and contemporary challenges that may impact on transplant reception and therefore the effectiveness of the ICPC and the CNL and
4. evaluates the ICPC and the CNL, applying the new evaluative test, in order to determine whether they have been successful post-intervention reforms for Afghanistan's criminal law framework and the promotion of rule of law.

The motivation for this study is that it acts as a response to Carother's criticism about the paucity of understanding amongst aid providers about how to bring about legal change. This is an area of research lacking in authoritative evaluative studies. DFID reported in 2002 that 'many initiatives in the justice sector have not been subject to careful monitoring and evaluation.'¹²⁷ Similarly, the UN's *Rule of Law* report lamented the 'scant attention'¹²⁸ that has been paid to post-conflict rule of law reform, an observation supported by Kirsti Samuels in 2006 who noted that 'despite two decades of experimenting, little is known about how to bring about legal change in developing or post-conflict countries.'¹²⁹ If international actors are drafting new laws to revise the criminal legal frameworks of states seeking to emerge from conflict as part of a general rule of law promotion agenda, they must consider how legal change can most effectively be achieved and, to that extent, whether legal transplantation would be the most effective and reasonable means of producing change. More research is required in this vital area to provide improved guidance for legislators on mechanisms for reforming criminal law in societies seeking transitions from conflict to peace following

¹²⁷ DFID, *Safety, Security and Accessible Justice: Putting Policy into Practice*, (July 2002) at <http://webarchive.nationalarchives.gov.uk/+/http://www.dfid.gov.uk/documents/publications/safesecureaccessjustice.pdf>

¹²⁸ UN, note 30, para. 24

¹²⁹ Samuels, note 16, p.18

international intervention.¹³⁰ Evaluating the ICPC and the CNL can shed light on the role of legal transplants as tools for developing criminal law frameworks in states attempting to emerge from conflict¹³¹ and contribute to scholarly theoretical understanding about them which, according to some commentators, remains ‘fairly rudimentary.’¹³²

1.4 Definitions and Concepts

The term ‘post-conflict’ implies an ‘end of organised, armed political struggle’¹³³ and in some circumstances the signing of a peace accord. These conditions have yet to be fulfilled in Afghanistan where political violence between the Taliban and forces supporting the Afghan government has been ongoing since 2001. I regard Afghanistan instead to be a ‘post-intervention’ state and I employ this term to refer to countries where the international community has intervened in an effort to enhance rule of law and to assist a transition from conflict to peace. This broad definition is intended to include countries seeking to emerge from conflict as well as post-conflict states where the international community has been engaged in rule of law promotion. As a result, while the research for this thesis is located in Afghanistan, it is anticipated that the conclusions reached will be relevant to the use of legal transplants for criminal law reform in states seeking to emerge from conflict and post-conflict states following international intercession.

The 2004 Constitution contains a number of cornerstone principles and guidelines that are significant for defining ‘human rights’ in Afghanistan and their relationship with criminal law. It guarantees internationally recognized standards relating to procedural fairness such as equality before the law,¹³⁴ the right to legal representation,¹³⁵ the right to silence,¹³⁶ the right to be tried without undue delay,¹³⁷ the presumption of innocence¹³⁸ and freedom from torture.¹³⁹ It also binds the Afghan state to conform to the UNDHR and other international treaties to which the country is a signatory,

¹³⁰ Vogler, note 103, p.2

¹³¹ Heim, J. ‘Predicting Legal Transplants: The Case of Servitudes in the Russian Federation’ (1996) 6, *Transnational Law and Contemporary Problems*, 187-224, p190

¹³² Kanda et al, note 77, p. 887

¹³³ Call, C.T. *Constructing Justice and Security after War*, United States Institute of Peace Press, Washington D.C. (2007), p.379

¹³⁴ Article 22 Afghan Constitution 2004

¹³⁵ article 31 Afghan Constitution 2004

¹³⁶ article 30

¹³⁷ article 31

¹³⁸ article 25

¹³⁹ article 29

including the ICCPR. This has further implications for human rights and criminal legislation because, as a result, all criminal law, transplanted or not, must be consistent with the requirements for procedural fairness and due process contained in articles 5, 7 and 9 of UNDHR and articles 6, 9 and 14 of the ICCPR.

I have employed the term human rights in this thesis in a narrow sense to relate to the specific rights enshrined in the Constitution and international treaties that relate to procedural fairness. This is because the two laws I evaluate are concerned in particular with criminal procedure. Furthermore, the human rights protected by international treaties are, by virtue of the Constitution, non-negotiable and must form part of the normative content of codified criminal law in Afghanistan, such as the ICPC and the CNL.

In doing so, however, I recognize that many Afghans are not familiar with the concepts of human rights enshrined in the Constitution, international treaties and codified law.¹⁴⁰ Most Afghans also refer to popular justice mechanisms to resolve their disputes, the practices of which contravene some of the international conceptions of human rights and procedural fairness standards established in the Constitution and protected by state law. Their lack of procedural transparency, exclusion of women and punishments of forced marriage are of particular concern.

There is then a dichotomy between those human rights protected by state law and those familiar to the majority of Afghans. These include, according to research by the AIHRC involving more than 4,000 respondents, 'the right to live and the right to its necessary components of food, shelter, clothing, and basic health care; freedom of thought and speech; ethnic, religious and gender equality; political rights such as the right to participate in free and fair elections; and the right to education.'¹⁴¹ There is also a distinction between the rights provided to Afghans through traditional justice mechanisms and the human rights ideal established by state law. While developing commitment to the latter is fundamental to the promotion of rule of law it is important for rule of law promotion programmes to acknowledge that in post-intervention states insistence on enforcing international standards of human rights and procedural fairness over and above community-based justice can often conflict with the vital goal of trying

¹⁴⁰ Nadery, N. 'A Human Rights Awakening?' in Thier, J. A. (ed.) *The Future of Afghanistan*, United States Institute of Peace, Washington DC (2009)

¹⁴¹ AIHRC, *A Call for Justice* (2005) available at http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf, p.7

to win support for new rule of law promotion measures from the local population. Stromseth's synergistic model for rule of law development underlines the importance of recognising this challenge and working over time with traditional justice processes to find means of providing oversight mechanisms to ensure compliance with international standards of human rights principles.

1.5 Organisation of the Thesis

The thesis is organised into 6 chapters. Following this introductory chapter, Chapter 2 examines legal transplants as mechanisms for promoting legal change. It considers what I term 'transplant justification' and determines, from an examination of historical evidence on the use of legal transplants, their practical utility and the motivations for employing them, that the actors responsible for drafting the ICPC and the CNL were justified in considering adopting the legal transplant mechanism in order to develop these laws. In order to be able to ascertain whether it was reasonable for them to proceed to rely on legal transplantation, judged against whether or not they were 'successful,' I also consider 'transplant evaluation' and develop a new evaluative test for application to the ICPC and the CNL following an examination of theoretical perspectives on transplant feasibility, the conditions necessary for successful transplantation and the reception experience of previous criminal law transplants, including those in post-intervention states.

This test acknowledges that the reception of these laws will be affected by local contextual concerns which influence the application of criminal justice in Afghanistan. Therefore, evaluating the reception of these laws requires an understanding of Afghanistan's criminal justice system, which I examine in Chapter 3. This chapter reflects on the legal traditions which influence criminal justice in Afghanistan and the historical development of the state system, which has involved the transplantation of foreign models. It also seeks to place the evaluation of the ICPC and the CNL in real time and place by documenting the progress of the reform of the state system post-2001 and by noting the challenges that the system faces, which may constitute potential constraints to the reception of these transplants.

Chapter's 4 and 5 are concerned with evaluating the ICPC and the CNL to determine whether or not they have been successful legal transplants and whether legal transplantation was an effective and reasonable means of developing these laws. These chapters examine the manner in which they have been applied, the extent to

which they are considered meaningful and appropriate, the impact on the reception of the laws of the motivation for developing them by legal transplantation and the extent to which they have achieved their objectives.

The concluding chapter, Chapter 6, draws together the issues explored and the findings of the study before developing practical and theoretical conclusions and providing recommendations for legal transplantation in future post-intervention states.

1.6 Methodology

1.6.1 Research Strategy

I began this research project in April 2007. In order to explore the issue of whether legal transplants might be appropriate tools for developing legislation designed to reform the legal frameworks of post-intervention states to promote rule of law I developed the following criteria in order to select the legislation that would become the focus of my research:

1. The legislation must be a legal transplant. To that extent, it had to comply with my definition for legal transplants proposed in Chapter 1;
2. The legislation must be adopted as a means of developing the criminal law framework of a post-intervention state in order to promote the rule of law;
3. The legislation must be an example of a recent legal transplant which has not yet been the subject of in-depth research evaluation.

Both the ICPC and the CNL met this criteria and I determined to evaluate them both in order to give more depth to the study. Both laws were legal transplants, dependent on legal rules borrowed from foreign sources legal and neither had been the subject of an evaluation. Furthermore, they were introduced to reform the criminal law framework in Afghanistan which represented a significant contemporary example of a post-interventionist state seeking to emerge from conflict where the international community has been engaged in substantial assistance programmes designed to promote the rule of law. In addition, the timing of their introduction was significant in that one pre-dates

and the other post-dates the UN Rule of Law report and its recommendation that reform in post-conflict states should avoid 'the importation of foreign models.'¹⁴²

There were also practical considerations involved in the decision to evaluate the CNL. The UK was the lead nation for counter narcotics policies and reform and UK actors were involved in drafting the law. Furthermore UK actors have been engaged in mentoring work at the CJTF. Following a meeting with a UK Afghan policy adviser who attended the Rule of Law Conference in Rome in July 2007 I was able to generate some useful contacts and sources for interviews of UK actors with experience of the application of the CNL. It was anticipated that some of these actors would be available for interview in London following periods of engagement in Afghanistan, which would be beneficial in terms of saving research costs and time given my work base at London Metropolitan University.

Having established the primary aims of the study and the central question that I wished to address, elucidated in Chapter 1, I undertook a comprehensive review of literature relating to legal transplants in order to develop an evaluative test which I could apply to the ICPC and the CNL to determine whether or not they have been successful legal transplants. This review included an examination of theoretical perspectives on their feasibility, value and the conditions of their success, the motivations for adopting them and their application in the context of criminal justice. From this I determined that a suitable evaluative test would entail examining four key areas. These were:

1. the manner in which the laws were applied;
2. the extent to which they have been considered meaningful and appropriate;
3. the motivations for their adoption, and
4. the degree to which they have achieved their objectives.

I also determined that the success or failure of the laws would be linked to local contextual concerns, challenges and constraints connected to the criminal justice system in Afghanistan and its plural legal traditions.

The literature review and the development of this evaluative test informed the methodological processes that have been adopted in order to undertake this research study. The central strategic approach to the research has been one that has involved

¹⁴² UN, note 30, p.4

interpretative phenomenological analysis using primarily qualitative data and a limited amount of quantitative data. I identified this approach as appropriate for this study as it is centred around the application of the evaluative test to the two laws and the interpretation of the results. This necessitated an in-depth study of these pieces of legislation, guided by all 4 of the strands of the evaluative test, the nature of which were such that they could appropriately be investigated by collecting valuable information and data from the participants and actors actually engaged in the application of the laws and capturing their experiences, thoughts and views in relation to the manner in which it has been applied, the extent to which it is meaningful and appropriate, why they were adopted and developed by legal transplantation and whether they have achieved their objectives. This data could then be interpreted to ascertain whether or not the ICPC and the CNL had been successfully received and also to address the central question of whether it was appropriate for them to have been developed by legal transplantation.

1.6.2 Methods of data collection

The methods of data collection used in this study were:

1. Semi-structured interviews;
2. Questionnaires, and
3. A review of literature and documentary data.

The decision to employ these different methods of data collection was informed by the research process of triangulation, defined by Jupp as 'the use of different methods of research, sources of data or types of data to address the same research question.'¹⁴³ Triangulation is achieved by gathering accounts or feedback from two or more different sources which have a common interest in terms of the subject matter of the research. Triangulation was achieved by in this study by simultaneously collecting data by means of semi-structured interviews, literature review and questionnaires. The rationale of employing these different methods of data collection was that they would help to provide as much information as possible relative to the four aspects of the evaluative criteria. Furthermore, it was anticipated that obtaining information from three sources

¹⁴³ Jupp, V. 'Triangulation' in McLaughlin, E, and Munice, J. (eds.) *The Sage Dictionary of Criminology*, London: Sage (2001); p.308

would improve the accuracy and authenticity of findings available from any one source, thereby enhancing the validity of any data collected.

After collecting the data from the semi-structured interviews, questionnaires and documentary review I systematically arranged it relative to the four aspects of the evaluative test for each law. This enabled me to respond to the evaluative requirements of the test and I was able to interpret the data in a logical manner and reach conclusions relative the reception of each law and the central question of the study.

1.6.3 Questionnaires

I developed questionnaires for both international and local actors for the ICPC and the CNL. After preparing initial drafts I distributed them to a number of colleagues at the Law Department at London Metropolitan University for their comments. I explained the aims of the thesis and the nature of the central research question and asked the reviewers for their comments regarding the questionnaires and, in particular, whether they felt that the questions would be understood by the respondents, were relevant to the aims of the research study and were framed in such a way as to invite response, taking into account the length of time it might take to complete them.

The questionnaires were re-shaped according to the feedback that I received. They were simplified and shortened considerably. Feedback suggested that the original drafts were too complicated and lengthy, and that they would take too long to complete. I was concerned that they did not comply with the recommendation of Simmons that questionnaires should take no more than half an hour to complete.¹⁴⁴ To that end, I reduced the questionnaires in size. The CNL questionnaire, which initially contained 26 questions was reduced to 11 and the ICPC questionnaire was scaled down from 24 to 9 questions. Ultimately, each questionnaire was no longer than 3 pages of A4 paper. The final versions were short, concise and respectful of the limited amount of time respondents would wish to devote to answering a questionnaire out of goodwill.

Each questionnaire started with an initial section asking 6 closed questions designed to ascertain the expertise of the respondent while ensuring that they would retain their anonymity. Respondents were asked to clarify the nature of the organisation for which

¹⁴⁴ Simmons, R. 'Questionnaire' in Gilbert, N. (ed.) *Researching Social Life* (2nd ed.) London: Sage Publications (2001); p.98

they worked, the length of time for which they had worked there, their job responsibilities, citizenship and involvement with Afghanistan's criminal justice system. A series of open and closed questions then followed specifically relating to each piece of legislation and structured around the central themes of the evaluative test for legal transplants proposed in Chapter 2. Each questionnaire ended with an open question inviting any further comments relating the legislation in question.

There is a general reluctance on the part of many people to respond to questionnaires¹⁴⁵ and this was evident in relation to the recipients of the questionnaires prepared for this study. This may be because of lack of accessibility to computers or online facilities that might facilitate easy responses. Responses are heavily dependent on the goodwill of recipients, without any reward and many may not have had the inclination or time to respond or may alternatively have been suspicious of their design in spite of the promise of anonymity.

1..6.4 Review of literature and documentary data

I undertook an extensive review of reports and surveys that have been conducted by Afghan ministries, international organisations and NGO's on various areas of the justice system in Afghanistan, some of which relate to criminal procedure. These surveys have adopted a variety of qualitative and quantitative research techniques and have involved monitoring of criminal case files and interviews with respondents, both men and women, from a variety of socio-economic, cultural and ethnic backgrounds who have had experience with the formal criminal justice system in Afghanistan and with the application of the ICPC and the CNL. This includes government authorities, members of the general public, and members of the legal community, including prosecutors, the police, judiciary and defence lawyers across the country.¹⁴⁶ The following are some of the reports referred to:

1. AIHRC's 'A Call for Justice' (2005) involved interviews of 4,150 respondents across 32 provinces;¹⁴⁷

¹⁴⁵ Kidder, L.H. and Judd, C.M. *Research Methods in Social Relations*, Fortworth: Holt, Rhinehart and Winston (1986), p224-225

¹⁴⁶ See in addition, UNODC, *Afghanistan. Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation* (2008) available at www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf (statistical data on crimes and sentences) and UNDP Afghanistan Human Development Report *Building Modernity and Tradition: UNDP, Rule of Law and the Search for Justice* (2007) available at <http://hdr.undp.org/en/reports/national/asiathepacific/afghanistan/nhdr2007.pdf>

¹⁴⁷ AIHRC, note 140

2. Asia Foundation's, 'Afghanistan in 2008. A Survey of the Afghan People' interviewed 6,500 respondents;¹⁴⁸
3. Carter and Clark's 'No Shortcut to Stability. Justice, Politics and Insurgency in Afghanistan' (2010) involved 40 interviews with a range of Afghan and international actors;¹⁴⁹
4. Integrity Watch's 'Afghanistan, Afghan Perceptions and Experiences of Corruption. A National Survey (2010) interviewed 6,500 respondents;¹⁵⁰
5. UNAMA's 'Arbitrary Detention in Afghanistan. A Call for Action' (January 2009) reviewed 2,000 detention cases and completed 1,000 prisoner interviews;¹⁵¹
6. Women and Children Legal Research Foundation's 'Women's Access to Justice. Problems and Challenges (2008) interviewed 1,350 respondents;¹⁵²
7. Roder's 'Provincial Needs Assessment: Criminal Justice in Uruzgan Province' (2010) interviewed judges, prosecutors and justice ministry officials;¹⁵³ and
8. Walker's 'Culturally-Attuned Governance and Justice in Helmand Province, Afghanistan' (2010) contained 50 interviews with Afghan justice officials.¹⁵⁴

The information from these reports provided valuable evidence relevant to the four strands of the evaluative test for each law. From my review of this documentary data I also collated some quantitative data in respect of crime statistics which was significant in terms of its contribution to assessing the application of both the ICPC and the CNL.¹⁵⁵

¹⁴⁸ Asia Foundation, *Afghanistan in 2008. A Survey of the Afghan People* (2008) available at <http://asaifoundation.org/publications/pdf/418>

¹⁴⁹ Carter, S. and Clark, K. *No Shortcut to Stability. Justice, Politics and Insurgency in Afghanistan*, Chatham House, (2010) available at www.chathamhouse.org.uk/publications/papers/view/-/id/985

¹⁵⁰ Integrity Watch Afghanistan, *Afghan Perceptions and Experiences of Corruption. A National Survey* (2010), p.1-130, available at www.iwaweb.org

¹⁵¹ UNAMA, *Arbitrary Detention in Afghanistan. A Call for Action*, Vol. 1 (January 2009) available at www.unama.unmissions.org/.../ADVC%20-%20Vol/021%20-%20English.pdf (a review of 2,000 detention cases and 1,000 prisoner interviews)

¹⁵² Women and Children Legal Research Foundation, *Women's Access to Justice. Problems and Challenges* (2008) available at www.wclrf.org/English/eng_pages/Resources/Women_a_t_Justice/WATJ.pdf

¹⁵³ Roder, T. *Provincial Needs Assessment: Criminal Justice in Uruzgan Province* (2010), available at http://www.mpil.de/shared/data/pdf/pna_uruzgan_final_1.pdf

¹⁵⁴ Walker, E.L. *Culturally-Attuned Governance and Justice in Helmand Province, Afghanistan*, International Media Ventures (April 2010) available at <http://www.Governance%20and%20Justice%20in%20Hlemand%20-%20WALKER1.pdf>

¹⁵⁵ Nau, D. 'Mixing Methodologies: Can Bimodal Research be a viable Post-Positivist Tool?' (1995) *The Qualitative Report* 2(3) available at <http://www.nova.edu/ssw/QR/QR2-3/nau.html>. According to Nau, 'blending qualitative and quantitative methods can produce a final product which can highlight the significant contributions of both;' p.253

1.6.5 Semi-structured Interviews

I conducted 24 interviews for this research between November 2006 and April 2011. I interviewed a range of actors with experience of the application of the ICPC and the CNL. These actors included representatives from the Afghan judiciary, prosecution and defence service, personnel from organisations including UNAMA, DFID, IJPO, the CJTF and ADIDU and local Afghan politicians.

Of the 24 interviews, 12 were conducted in person and the rest by telephone and skype. The interviews were semi-structured and I adopted the relevant questions contained in the questionnaires as a framework for the issues discussed during them. The interviews lasted between half an hour and three hours. In some cases, I interviewed the same person more than once. Records of the interviews were made where possible by cassette recordings with the consent of the interviewee. In the alternative, with the consent of the interviewee, I made contemporaneous hand written notes. Recordings and handwritten notes were then later typed up.

Table 2 confirms the dates of the interviews and the organisation to which they are affiliated or their position. I offered anonymity to the interviewees in order to protect their identities. With regard to those who wished to remain anonymous I have indicated only their position or institutional affiliation at the time of interview. In some instances I have used a generic term to refer to their position (e.g. legal consultant) when disclosing their real job description or role in an organisation would reveal their identity.

I also attended the international Conference on the Rule of Law Conference in Afghanistan in Rome in July 2007 chaired by the United Nations. In addition I took part in a roundtable discussion on 26 April 2011 at Whitehall, London chaired by Alistair Burt MP, Minister for Middle East and South Asia, as part of an advisory panel to advise on UK policy on justice and rule of law in Afghanistan in the transition period leading up to 2014. I was able to have a number of informal discussions with a range of UK and international actors and NGO delegates involved in justice and rule of law issues during these two events. This includes personnel from the UK Helmand PRT, DFID, the CPS, the UK Ministry of Defence, International Institute for Strategic Studies, International Crisis Group, Penal Reform International, and Transparency International.

Table 2

| Name | Designation/Organisation | Date |
|--------------------------------|---|-------------|
| Sayed Banouri ¹⁵⁶ | Afghan Judge and Legal Adviser | 10.11.2006 |
| Sari Kuovo ¹⁵⁷ | Head of Afghanistan Programme International Centre for Transitional Justice and former Researcher for Amnesty International | 31.05.2007 |
| Nazia Hussain ¹⁵⁸ | UNAMA Human Rights officer | 06.06.2007 |
| Sophie Goodrick ¹⁵⁹ | Afghan Policy Adviser Crown Prosecution Service, London | 25.07.2007 |
| | Senior UNAMA Rule of Law officer ¹⁶⁰ | 17.10.2007 |
| | Senior member of UK Rule of Law team British Embassy, Kabul ¹⁶¹ | 29.02.2008 |
| | UK senior prosecutions adviser British Embassy Drugs Team, Kabul ¹⁶² | 25.06.2008 |
| | Former senior Italian government adviser; Adviser to the Italian Ministry of Foreign Affairs on Afghan issues and the IJPO ¹⁶³ | 17.07.2008 |
| | International Drugs and Development Adviser ¹⁶⁴ | 02.12.2008 |

¹⁵⁶ interview by meeting, Sussex

¹⁵⁷ interview by meeting, London

¹⁵⁸ interview by meeting, London

¹⁵⁹ interview by meeting, London. Additional email correspondence 30.07.2007 and 01.08.2007

¹⁶⁰ interview by meeting, London. Additional email correspondence 19.11.2008

¹⁶¹ interview by meeting, London. Additional telephone interview 25.03.2008

¹⁶² interview by meeting, London

¹⁶³ interview by meeting, Rome. Additional email correspondence 18.07.2008, 06.10.2008 and 23.10.2008

¹⁶⁴ telephone interview. Additional email correspondence 29.11.2008 and 28.01.2009

| | | |
|----------------------------|--|------------|
| | International Drugs and Development Adviser ¹⁶⁵ | 09.12.2008 |
| | PRT Justice Adviser, Helmand Province ¹⁶⁶ | 12.12.2008 |
| | CNTF Prosecutions Casework Advisor British Embassy, Kabul ¹⁶⁷ | 06.02.2009 |
| Ahjmal Khan ¹⁶⁸ | Afghan Tribal Chief and Parliamentary candidate | 01.10.2009 |
| | Rule of Law counsel, US Dept of the Attorney General ¹⁶⁹ | 16.11.2009 |
| | Senior member of Rule of Law Team, ADIDU, London ¹⁷⁰ | 09.02.2010 |
| | PRT Justice Adviser, Helmand Province ¹⁷¹ | 24.02.2010 |
| | CNTF Senior Prosecutions Adviser British Embassy, Kabul ¹⁷² | 23.02.2010 |
| | Senior Afghan defence lawyer ¹⁷³ | 25.04.2010 |
| | Senior member of Rule of Law Team, ADIDU, London ¹⁷⁴ | 31.03.2011 |
| | Defence and Security Counter Corruption Team, Transparency International | 26.04.2011 |

¹⁶⁵ telephone interview. Additional email correspondence 13.12.2008 and telephone interview 18.06.2009

¹⁶⁶ telephone interview. Additional telephone interview 25.03.2010

¹⁶⁷ interview by meeting, London. Additional telephone interview 24.12.2008

¹⁶⁸ interview by meeting, London

¹⁶⁹ interview by telephone. Interviewee based in Kabul

¹⁷⁰ interview by meeting, London

¹⁷¹ interview by meeting, London

¹⁷² telephone interview. Interviewee based in Kabul

¹⁷³ telephone interview. Interviewee based in Kabul. Additional telephone interview with interpreter 09.05.2010

¹⁷⁴ telephone interview 31.03.2011

1.6.6 Limitations

The main limitations encountered during the conduct of the research were costs, work commitments and security concerns in Afghanistan. I have had to organise my research around my full-time employment commitments, which have prevented the potential for placements with organisations based in Afghanistan for any extended periods of time from which I might have been able to generate data.

On two occasions I did attempt to make short trips to Afghanistan when work permitted with the intention of conducting personal interviews with personnel in the criminal courts and at the CJTF. However, both trips were aborted due to security issues and costs.

In February 2009 I had made arrangements to travel to Kabul to interview Judges at the CNT. The interviews were to be facilitated by a representative from UK Foreign Office who agreed to arrange travel to and from the Courts and to organise the interviews with an interpreter. I would arrange my own travel to Kabul and accommodation. Having organised this, security issues at Kabul prevented the trip. On 11 February 2009 the Taliban attacked government buildings, including the Directorate of Prisons and the Ministry of Justice. Following the attack, the Foreign Office representative stated that the Office could no longer organise my travel to the Courts. Furthermore, the Sussex Institute Research Governance and Ethics Committee at Sussex University took the decision that it was not possible to sanction the trip and proposed data collection.

I made further arrangements to visit the CNT in February 2010, with the assistance of a prosecutions casework adviser based at the British Embassy in Kabul. I contacted recommended companies for quotes for arranging security for trips to and from the Courts as well as safe accommodation and was informed that the estimated costs would amount to £7,500 for a four-day trip, which was prohibitive as I simply could not afford this expense.

2 Legal Transplants: Justification and Evaluation

Introduction

The ICPC and the CNL were, in their separate ways, designed to contribute to the development of Afghanistan's criminal law framework by introducing new procedural rules and more contemporary means of preventing the production, consumption and trafficking of illicit narcotics. In both instances international actors responsible for drafting them chose to be influenced by western templates rather than Afghan legislative sources. Moreover, while looking abroad for inspiration they decided that the most effective mechanism for developing these laws was that of legal transplantation.

To address the issue of whether this was a reasonable response to the challenges that the legislators of the ICPC and the CNL faced, which is the central concern of this thesis, this chapter examines legal transplants as tools for promoting legal change. It is organised into two sections. Section 2.1 seeks to determine whether there was any justification for relying on legal transplantation to develop these laws. If legal transplants are unpromising devices for constructing new legislation it would suggest that the law reformers responsible for the ICPC and the CNL were unjustified in employing the legal transplant mechanism and, as a result, that it was unreasonable to have developed these laws in this way. In examining this issue of what I term '*transplant justification*' this section of the chapter considers the practical utility of legal transplants as mechanisms for criminal law reform as well as relevant motivational rationale for employing them to create legislation, including criminal legislation in post-intervention states.

Section 2.2 is concerned with the key issue of what I refer to as '*transplant evaluation*.' In order to properly address the wider issue of whether reliance on legal transplantation was an effective response to the legislative challenges that the particular drafters of the ICPC and CNL faced it is necessary to apply to these laws a suitable evaluative test to determine whether or not they have proved to be successful. If they have been unsuccessful it would also suggest that it was unreasonable for them to have been developed by means of legal transplantation. This section of the chapter explores theoretical perspectives on transplant feasibility, the conditions required for successful legal transplantation and the experience of previous criminal law legal transplants before proposing a suitable evaluative test for application to the ICPC and the CNL.

Section 2.1 Transplant Justification: The ICPC and The CNL

2.1.1 Legal Transplants as Mechanisms for Criminal Justice Reform

Evidence would suggest that legislators have a natural professional inclination to turn to legal transplants to solve legislative difficulties when creating new law. Following an examination of the transplantation of criminal evidence law from Anglo-American to continental jurisdictions Damaska noted that ‘in their search for new solutions, lawyers are prone to focus almost exclusively on normative aspects of foreign arrangements, trying to ascertain whether they hold promise of advantages over domestic law.’¹ Damaska concluded that ‘in seeking inspiration for change, it is perhaps natural for lawyers to go browsing in a foreign law boutique.’² There is a wealth of evidence available to substantiate a claim of professional leaning towards legal transplantation for legislative problem solving. Historically, legal transplants have contributed to legal development in most areas of law and in a large number of the world’s legal jurisdictions.³ Examples range from the Code of Hammurabi in 17th century BC⁴ to law and development ‘legal transplant projects’⁵ undertaken after WWII in countries such as Japan, later during the 1960’s and more recently following the collapse of the Soviet empire when attempts were made, according to Mertus, ‘to transplant laws and, in some cases, entire legal systems from one place to another.’⁶

The ubiquity and significance of legal transplants as tools for promoting legal change is particularly evident in the field of criminal law. The remarkable influence of the Napoleonic *Code d’Instruction Criminelle* (CIC) illustrates the power of the legal transplant phenomenon as an instigator for legal development. Since its enactment in 1808 it has served as a pervasive precedent for criminal justice reform around the world.⁷ Within 60 years of being passed, versions of it were transplanted into most of

¹ Damaska, M. ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments’ (1997) 45 *American Journal of Comparative Law*, 839-852, p.839

² *ibid*, p.852

³ For examples of legal transplants and (1) corporate law: see Kanda et al, note 77, chapter 1, p.887-902; (2) disabilities law: see Heyer, K.C. ‘The ADA on the Road: Disability Rights in Germany’ (2002) 27 *Law and Social Enquiry*, p.723-772; (3) copyright: see Geller, P.E. ‘Legal Transplants in International Copyright: Some Problems of Method’ (1994) 13 *UCLA Pacific Basin Law Journal*, p.199-230; (4) financial law: Nichols, P.M. ‘The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code’ (1997) 18 *University of Pennsylvania Journal of International Economic Law*, p.1235-1280; and (5) criminal law: Beckstrom, note 83, chapter 1, p.557-583

⁴ Miller, note 79, chapter 1, p.839

⁵ A phrase adopted by Julie Mertus in ‘From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society’ (1998-1999) 14 *American University International Law Review*, 1335-1389, p.1377

⁶ *ibid*, p.1378; Graziadei, M. ‘Transplants and Receptions’ in Reimann, M. and Zimmermann, R. (eds), *The Oxford Handbook of Comparative Law*, Oxford University Press (2006), p. 442-474

⁷ Vogler, note 103, chapter 1, p.59

the criminal jurisdictions of continental Europe. The Italian criminal codes of 1808 and 1848 were heavily influenced by it, as were codes in Prussia 1851, Russia in 1864 and Holland in 1867.⁸ Beyond Europe its provisions were borrowed by Japan in 1882⁹ and it was a significant influence on criminal procedural reform during the 19th and 20th centuries in a number of Muslim countries.¹⁰

Legal transplants have also been employed as mechanisms to reform inquisitorial criminal justice systems by introducing adversarial procedures. In a wave of post-revolutionary liberal idealism inspired by the French Revolution a host of countries with inquisitorial traditions transplanted adversarial procedures during the 19th century in order to introduce jury trials based on the English trial system into their own criminal systems. Jury trials were imported into French criminal procedure in 1789, and implanted into Spain in 1820, Portugal in 1830, Germany in 1848, Italy in 1860 and Russia 1864. More recently they were re-introduced in Russia in 1991 and in Spain in 1995 by means of legal transplantation.¹¹ Italy radically reformed its inquisitorial system by adopting significant adversarial procedures based on the Anglo-American model in its 1989 Code of Criminal Procedure.¹² Similarly, Russia's Criminal Procedure Code 2001 borrowed models from western Europe and the US¹³ and incorporated Italy's plea-bargaining procedures.¹⁴ In addition, a number of eastern European countries have instigated or are currently in the process of undertaking similar reforms of their procedural codes to adopt adversarial procedures. Croatia, Bosnia and Herzegovina, Moldova and Georgia have all recently transplanted adversarial trial elements into their criminal procedures.¹⁵

Similar criminal procedure 'revolutions' have taken place in several Latin American jurisdictions over the last 20 years, assisted by legal transplantation. It was estimated

⁸ *ibid*, p.58-59

⁹ Watson, A. 'Legal Transplants and Law Reform' (1976) 92 *Law, Quarterly Review*, p.82

¹⁰ The Ottoman Empire introduced a Penal Code in 1858 based on the *CIC* and a later procedural Code (1879) represented a translation of the French code. Persia's 1912 Criminal Code was also based on the *CIC* and Egypt's first criminal code (1882) was similarly dependent on it; see Vogler, note 7, p.115-118

¹¹ *ibid*, p.233-253

¹² Marafioti, L. 'Italian Criminal Procedure: A System Caught Between Two Legal Traditions', in Jackson J., Langer, M. and Tillers, P. (eds) *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Damaska* (2008) Oxford UK: Hart, p.81-98, p.81

¹³ Orland, L. 'A Russian Legal Revolution: The 2002 Criminal Procedure Code, (2002) 18(1), *Connecticut Journal of International Law*, 133-207.

¹⁴ Burnham W., Maggs, P.B. and Danilenko, G.M. *Law and Legal System of the Russian Federation*, Yonkers, New York, Juris Publishing, 2nd ed. (2004), p.531

¹⁵ Krapac, D. 'Some Trends in Continental Criminal Procedure in Transition Countries of South-Eastern Europe' in Jackson, note 12, p.134; Alkon, C. 'Plea Bargaining as a Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?' (2010) 19, *Transnational Law and Contemporary Problems*, 355-418, p.371; and Vogler R.K. and Jokhadze, G. 'Plea Bargaining in Georgia: A Utilitarian Perspective,' Tbilisi, Georgian Ministry of Justice (2011)

in 2003 that 80% of Latin American countries were involved in criminal procedure reform to replace their inquisitorial systems with adversarial ones.¹⁶ New criminal codes importing Anglo-American adversarial procedures by transplantation were introduced in Venezuela in 1998-1999, Chile in 2000, Ecuador and Bolivia in 2001 and Nicaragua and Honduras in 2002.¹⁷

Legal transplants appear to be ubiquitous in the field of criminal law. However, while their prevalence underlines their significance as tools for promoting legal development it does not fully explain why criminal law legislators might have a 'natural' professional inclination to rely on them when creating new law. Why do legislators find them so appealing?

2.1.2 Motivations for Transplanting Law

Foreign transplanted law may be attributed with symbolic significance making it attractive to legislators and members of the legal profession who are often recognised as the purveyors of legal change.¹⁸ Miller's useful typology refers to these types of transplants as 'legitimacy-generating'.¹⁹ The motivation for borrowing foreign law – and indeed the prospects of the transplant being successful – is related to the degree of prestige that the new law carries.²⁰ A new law may be regarded as more prestigious and authoritative if it has been borrowed from a foreign country where it has been successfully applied.²¹ Conversely, according to Watson, who observes that 'all law making ...desperately needs authority',²² transplanted law enhances the authority of those who administer it.²³ Graziadei appears to agree, his study of the adoption of German criminal law thinking among US scholars concluding that 'prestige motivates imitation'.²⁴ The prestige attached to a law, deriving from legal system from which it is

¹⁶ Haftez, J.L. Latin America: Views on Contemporary Issues in the Region. Pre-Trial Detention, Human Rights and Judicial Reform in Latin America (2003), 26(6), *Fordham International Law Journal*, 1754-77, p. 1754-5

¹⁷ Argentina prepared a model penal code for Latin America – the 'Codigo Procesal Penal Modelo para Iberoamerica,' which reflected German procedures and was adopted by Paraguay in its 1999 criminal code; Vogler, note 7, p.172.

¹⁸ Friedman, L. (2001) 'Some Comments on Cotterrell and Legal Transplants,' in Nelken, note 75, chapter 1, 93-98, p. 96

¹⁹ Miller, note 4, p.839-854

²⁰ Watson, A. 'Aspects of Reception of Law' (1996), 44, *American Journal of Comparative Law*, 335-352; p.335

²¹ Kanda et al, note 3, p.889

²² Watson, note 20, p.335

²³ Watson, A. (1978) 'Comparative Law and Legal Change,' *Cambridge Law Journal*, 37, p.313-336, p. 315; Watson, A. *The Evolution of Law* John Hopkins University Press (1985), p.119.

²⁴ Graziadei, M. 'Transplants and Receptions' in Jackson, note 12, p. 442-474; p.458

sourced²⁵ or to the perceived global importance of the law provides it with the important ingredient of legitimacy.²⁶ The prestige and the authority-enhancing effect of foreign law can, then, be a powerful motivation for transplanting it to the extent, according to Miller, that it may override any concern about whether or not adopted law might actually be appropriate for the receiving criminal system.²⁷

There are also 'cost-saving' motivations for transplanting foreign law. They represent cheap and easy solutions to legislative problems that have been tried and tested elsewhere.²⁸ They have, Watson explains, 'practical utility.'²⁹ It is simply easier to borrow than to create a new law as exemplified by the recent importation of US-inspired plea-bargaining procedures into the criminal justice systems of Moldova, Georgia and Bosnia Herzegovina in order to reduce pre-trial detention overcrowding.³⁰

Economic development and globalisation are also powerful motivational forces for legal transplants. Legislators in developing countries, encouraged by international institutions and foreign governments, are increasingly looking to foreign legislative models to enable international commerce and investment. According to Miller 'economic development, democratization and globalization have today so sharply increased the number of legal transplants that at least in developing countries, most major legislation now has a foreign component.'³¹ Theoreticians such as Langer and Kahn-Freund agree that the increase in circulation of legal ideas and institutions through globalisation has supplemented reform by transplantation.³² Heydebrand goes further, suggesting that globalisation is in itself a larger form of the whole process of legal transfer.³³

²⁵ Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment II of II)' (1991), 39, *American Journal of Comparative Law*, p.398-399

²⁶ DeLisle, J. 'Lex Americana?: United States Legal Assistance, American legal Models and Legal Change in the Post-Communist World and Beyond' (1999), 20, *University of Pennsylvania Journal of International Economic Law*, 179-308; p.280-281

²⁷ Miller, note 4, p.858

²⁸ Kanda et al, note 3, p.889; Friedman, note 18, p.94; Nader, L. *The Life of the Law: Anthropological Projects*, University of California Press Ltd (2002), p.48

²⁹ Watson, note 20, p.335

³⁰ Alkon, note 15, p.14

³¹ Miller, note 4, p.839-840

³² Langer, M. 'From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure,' (2004), 45, *Harvard International Law Journal*, 1-64, p.29; Kahn-Freund, O. 'On Uses and Misuses of Comparative Law,' (1974), 37, *Modern Law Review*, 1-27; p.9

³³ Heydebrand, W. 'From Globalisation of Law to Law under Globalisation' in Nelken, note 75, chapter 1, p.117-137

Modernisation is also a key justification for transplanting law.³⁴ Countries, particularly developing countries, are motivated to borrow foreign law to both modernise their justice systems and ensure that they comply with the standards of more economically powerful countries. Japan enacted codified law in the 1890's, including a criminal procedure code based on the French *CIC*, to facilitate the building of a modern nation state.³⁵ Between 1839 and 1970 many countries with Muslim majorities adopted codified laws from continental Europe in efforts to modernise their criminal justice systems.³⁶ Turkey, intent on creating a secular state and marginalising the influence of Islamic and customary practices, transplanted European models to modernise its criminal justice system in the 1920's. Its 1926 Penal Code was based on the 1899 Italian code and the 1928 Criminal Procedure Code was influenced by German models.³⁷ Egypt underwent similar 'modernising' reforms in 1956 to develop a semi-secular criminal justice system,³⁸ as did Tunisia in 1958.³⁹

Modernisation is also at the heart of more recent transplants involving the adoption of measures to ensure compliance with western-approved international standards of human rights and due process. For example, Russia's 2002 Criminal Procedure Code, which included due process provisions, protections for defendants, a bail system and plea-bargaining borrowed from the Italians, was specifically designed to 'make the Russian Criminal Justice System more compatible with the requirements of the Western democracies' and to 'facilitate the integration of Russia into the western community.'⁴⁰ Similarly, reform of the 2009 Georgian Criminal Procedure Code was, according to a recent report, 'directed towards the strengthening of adversarial principles as well as bringing the Georgian justice system into compliance with international and European human rights standards.'⁴¹

International rule of law and development programmes intent on establishing peaceful liberal democracies have resulted in law reform initiatives to introduce new 'modern'

³⁴ Beckstrom, note 3, p. 583

³⁵ Tanase, T. 'The Empty Space of the Modern in Japanese Law Discourse' in Nelken, note 18, p. 190

³⁶ Vogler, note 7, p.126

³⁷ Coulson, N. *A History of Islamic Law*, Edinburgh, Edinburgh University Press (1999); p.152

³⁸ Etling, B. *Legal Authorities in the Afghan Legal System (1964-1979)* (2003) available at <http://www.harvard.edu/programs/ilsp/research/etling.pdf>, p.1-15; p.2

³⁹ Vogler, note 7, p.119

⁴⁰ Ambassador Vershbob, Opening Remarks at the All Russia Academic Conference on Implementation of the Criminal Procedure Code of the Russian Federation 04.02.2002, cited in Orland, note 16, p.133; Burnham W. and Kahn, J. 'Russia's Criminal Procedure Code Five Years Out,' (2008) 13, *Review of Central and East European Law*, p.1-93

⁴¹ 'Recommendations by Richard Vogler Following the Round Table in Strasbourg on 16 December 2009 on the Action Plan for the Implementation of the Georgian Criminal Procedure Code,' held on file by the author

law to enhance western and US conceptions of the democratic ideal.⁴² For adopting countries, seeking conformity with US law may be deliberately affected to mark symbolic transitions from former regimes or contrived to declare geo-political affiliation.⁴³ Mertus identifies distinct waves of law and development movements when international actors embarked on large-scale legal transplantation as a result of technical assistance programmes for the development and legal regeneration of various countries throughout the world.⁴⁴ In the aftermath of WWII legal actors from the victorious nations engaged in projects to revise constitutions of the defeated powers.⁴⁵ Moreover, in the 1960's an explosion of law and development activity took place when US academics and private foundations sent lawyers to countries, principally in Africa and Latin America, to train lawyers and promote US law as a vehicle for creating liberal democracies.⁴⁶ These programmes aspired 'to promote US-style legal education and the use of law as a positive instrument of socio-political change'⁴⁷ in such a way that it would engender in the developing countries⁴⁸ US liberal ideals such as the protection of individual freedoms, the expansion of local participation in decision-making and the enhancement of social equality.⁴⁹ The modernisation of the various legal systems with which the external US-promoting agents were involved was processed by significant transplantation of foreign law.⁵⁰

A further wave of law and development programmes followed the collapse of socialist systems under the former Soviet Union in the late 1980's and early 1990's when legal experts, largely from Western democracies, engaged in major constitutional and legal reform projects⁵¹ which, once again, involved the adoption of legal transplants.⁵² More recently, as noted in chapter 1, multiple NGO's and the UN have been actively engaged in various legal technical assistance in post-intervention states to promote

⁴² Suhrke, A. 'Reconstruction as Modernisation: the 'post-conflict' project in Afghanistan', (2007), 28:7, *Third World Quarterly*, 1291-1308, p.1293

⁴³ This has been the case with regard to Georgia's adoption of a US plea bargaining system. See Vogler, note 15

⁴⁴ Mertus, note 5, p.1335-1389

⁴⁵ *ibid*, p.1378

⁴⁶ *ibid*, p.1377

⁴⁷ Carothers, T. *Assessing Democracy Assistance: The Case of Romania*, Washington, DC: Carnegie Endowment for International Peace (1996), p. 52

⁴⁸ I use the term 'developing countries' to refer to countries with relatively low per capita incomes and comparatively small industrial sectors in Latin America and Africa during the 1960's and 1970's. This includes all countries in these continents.

⁴⁹ Trubek, D.M. and Galanter, M. 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,' (1974) *Wisconsin Law Review*, 1062-1103; p.1063

⁵⁰ Gardner, J.A. *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*, Madison, University of Wisconsin Press (1980)

⁵¹ Berkowitz D., Pistor, K., Richard, J-F. 'The Transplant Effect' (2003) 51 *American Journal of Comparative Law*, 163-201. Berkowitz refers to legal reform in Central and Eastern European states following the collapse of the Soviet Union as akin to a 'legislative tornado,' p.164

⁵² Ajani, G. 'By Chance and By Prestige: Legal Transplants in Russia and Eastern Europe,' (1995) 43 *American Journal of Comparative Law*, p.93

rule of law promotion and transitions from conflict to peace. In the process they have engaged in projects of legal and institutional transplantation to initiate reform, not least with regard to enhancing the criminal law frameworks of these countries.

2.1.3 Motivation and Post-Intervention Criminal Law Reform

Any of the previously noted motivations for transplanting law may be at stake during criminal law reform initiatives in post-intervention states. New transplanted law may ensure prestige and legitimacy, or may be the result of simple expediency. The quick practical utility of legal transplants as tools for legal reform can also render them attractive to criminal law reformers intent on developing criminal law frameworks to promote rule of law. Adopting tried and tested legal transplants can save valuable time in circumstances where there is an urgent requirement for new criminal law in countries emerging from conflict and to help to fill any 'rule of law vacuum' resulting from ineffective or insufficient applicable law.⁵³

Globalisation is also a significant motivational force for post-intervention criminal law legal transplants. Just as globalisation facilitates the expansion of transnational crime such as drug trafficking in post-intervention states, as has been the case in Afghanistan,⁵⁴ at the same time it can guide the development of legislative processes to tackle it. Post-intervention states lacking suitable preventative law risk becoming safe havens for organised criminal and terrorist activity. The content of new law created to counter threats of this nature can be steered by the requirements of multilateral conventions, instruments and bilateral treaties which promote legislative similarity between signatory countries to enhance international co-operation in the investigation and prosecution of transnational criminal activity. The consequent drive for global legislative uniformity can be usefully accommodated by legal transplantation.⁵⁵

In addition, outdated laws in post-intervention states may need to be replaced by more 'modern' legislation equipped with tools to deal with contemporary criminal realities. UNTAC drafted a new criminal law for Cambodia, enacted by the Supreme National Council in 1992, to replace inadequate domestic legislation.⁵⁶ Bosnian criminal law lacked definitions for relevant crimes, such as corruption and money laundering, and

⁵³ O'Connor, note 88, chapter 1, p.245; see UN *Brahimi Report*, note 85, chapter 1, which recommended the creation of readily-available interim criminal code templates for deployment by 'quick response' legal teams, para. 83

⁵⁴ Discussed in more detail in Chapter 5

⁵⁵ UNODC, *Criminal Justice Assessment Toolkit: Cross-Cutting Issues. International Cooperation*, (2006) available at http://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/CJAT_Toolkit_full_version.pdf; p.1 and p.8

⁵⁶ O'Connor, note 5, chapter 1, p.523

failed to provide mechanisms to restrict these activities, such as the confiscation of profits, necessitating legal changes by a new criminal procedural code.⁵⁷ In a similar manner, the CNL was designed to introduce modern investigative procedures into Afghanistan's criminal law framework in order to tackle increasingly sophisticated illicit drug production and trafficking.⁵⁸

Whether prestige, globalisation, modernisation or efficiency are implicated, one of the key objectives of employing legal transplants to facilitate criminal law reform in conflict states has been the necessity of ensuring compliance with international due process and human rights standards. The development since WWII of areas such as international criminal law, transitional justice and human rights law has created a globally recognised rights framework which influences the normative content of new domestic criminal law. New law must be consistent with internationally approved fair trial standards, such as those provided for in the ICCPR, easily realisable by transplanting provisions from foreign laws that already conform with these requirements.⁵⁹ In East Timor, UNTAET revoked sections of the existing Indonesian Criminal Code in 1991 lacking compliance with international human rights standards and later promulgated a more appropriate criminal law into which were transplanted provisions in tune with international human rights expectations.⁶⁰ Similarly, in addition to modernising Cambodia's criminal justice system by providing new rules for detention, substantive law and procedure, UNTAC's 1992 Criminal Code ensured the protection of citizen's human rights.⁶¹ In Afghanistan, the ICPC was designed to provide a uniform criminal procedure while also guaranteeing compliance with international legal and human rights obligations. The development of these laws was facilitated by the adoption of legal transplants, highlighting their motivational attraction to legislators intent on ensuring that new criminal law in post-intervention states complies with international human rights and due process standards.

The variety of reasons why legal transplants are attractive mechanisms for legal development and the historical frequency with which legal transplantation has been responsible for developing new criminal law would appear to support an argument that criminal law reformers in post-intervention states are indeed justified in relying on the transplantation of foreign solutions and, therefore, that the same must be said of the

⁵⁷ Call, note 3, chapter 1, p.250-253

⁵⁸ Articles 47-51 CNL 2005

⁵⁹ Boon, note 68, chapter 1, p. 299

⁶⁰ UNTAET Regulation no. 2000/30; O'Connor, note 53, p.240 and O'Connor, note 56, p.523

⁶¹ O'Connor, note 56, p.524

legislators responsible for the ICPC and the CNL. However, before reaching any conclusions in this respect it is helpful to examine theoretical perspectives on transplant feasibility, which provide valuable insights on the legitimacy and constraints of legal transplants as tools for promoting legal change.⁶² If legal transplants can be adjudged to be valueless or even unfeasible tools for legal change there is perhaps no justification for employing them at all.

2.1.4 Theoretical Perspectives on Legal Transplants as Tools for Legal Change

The value of legal transplants as tools for creating legal change and as explanatory devices for trans-national legal development has been the subject of considerable academic debate and, perhaps unhelpfully for law reformers, disagreement. The debate was triggered to a large extent by the publication in 1974 of Alan Watson's 'Legal Transplants: An Approach to Comparative Law.'⁶³ Watson suggested that legal transplants have the exalted distinction of being the one fundamental device for explaining legal development across the world's jurisdictions. According to him, 'transplanting is ...the most fertile source of development. Most changes in most systems are the result of borrowing.'⁶⁴

Much of the academic literature on legal transplants that has followed Watson's thesis has been concerned with the association between a transplanted law and its importing and exporting environments; in a wider context the relationship between law and society as an explanation for the development of law. To a large extent disagreements over the existence and feasibility of legal transplants have reflected conflicting perspectives over the relationship between law and the society in which it exists.⁶⁵ Watson's controversial theory on legal transplants represents one extreme. His historical analysis of legal development and the prevalence of legal transplantation as a mechanism for promoting legislative change leads him to conclude that there is only a tenuous relationship between law and the society in which it operates, the significance

⁶² Xanthaki, H. 'Legal Transplants in Legislation: Defusing the Trap,' (2008) 57(3), *International and Comparative Law Quarterly*, 659-673; p. 659

⁶³ Watson, A. 'Legal Transplants: An Approach to Comparative Law' (1974) University of Georgia Press, Athens, Georgia. Kahn-Freund responded with an article the same year 'On Uses and Misuses of Comparative Law', 37, (1974), *Modern Law Review*, 1-27.

⁶⁴ *ibid*, p.95; Watson, A. (2000) 'Ius Commune Lectures on European Private Law', (December 2000) 4.4 *Electronic Journal of Comparative Law* available at <http://www.ejcl.org/ejcl/44/44-2.html>, p.9

⁶⁵ Kanda, note 3, p.889

of which is at best limited.⁶⁶ The recipient system simply 'does not require any real knowledge of the social, economic, geographical and political context of the origin and growth of the original rule.'⁶⁷ Law, for Watson, consists of prepositional statements and rules which have an autonomous existence separate from environmental concerns, affording them a nomadic character that enables them to be easily transplanted from one jurisdiction to another. Drawing on numerous examples of the pervasive influence of Roman law on the development of law in continental Europe he concludes that 'the picture that emerge[s] [l]s of continual massive borrowing...of rules.'⁶⁸ Indeed, the many examples of successful borrowing and transplantation of legal rules over the course of legal history, rules which have not experienced change in their new environment, demonstrate the autonomous nature of law and its independence from external influences⁶⁹. Similarly, rules which might seem deeply entrenched in their political context are capable of being successfully transplanted to countries with quite different socio-political cultures.⁷⁰

Legrand offers a perspective on transplant feasibility entirely at odds with that proposed by Watson, asserting that legal rules are so dependent on the national environment in which they exist that they are incapable of travelling at all. Law, then, cannot be transplanted. A rule's very existence is dependent on the meaning ascribed to it by its interpretative community, its 'invested meaning,'⁷¹ which is conditioned by cultural and historical dynamics. Because the meaning of rules are so culture-specific, they cannot be transferred between countries simply because 'meaning does not survive the journey.'⁷² Legrand contends that if an attempt is made to transfer a legal rule wholesale from one country to another the only thing that would survive the trip would be 'a meaningless form of words.'⁷³ The relationship between legal rules and society is so interdependent that essentially, for Legrand, transplants are 'impossible.'⁷⁴ If law reformers are to follow Legrand's advice, they should abandon completely any notion of attempting to create new law through the advent of legal transplantation.

Several other theories have been proposed on the existence, cause and relevance of legal transplantation as an explanation for legal development, which lie somewhere

⁶⁶ Ewald W. 'Comparative Jurisprudence: The Logic of Legal Transplants' (1995) 43(4) *American Journal of Comparative Law*, (Autumn 1995), 489-510, p.509.

⁶⁷ Watson, note 9, p. 81; Heim, note 131, chapter 1, p193

⁶⁸ Watson, *ibid*, p.107

⁶⁹ Watson, note 23, p. 315

⁷⁰ Watson, note 9, p.82

⁷¹ Legrand, P. 'What Legal Transplants' p.55-70 in Nelken, note 18, p. 60

⁷² *ibid*

⁷³ *Ibid*, p.63

⁷⁴ *Ibid*, p.57

between the opposing views of Watson and Legrand, each offering different variations on the key factors that play a part in transplant feasibility. Most of these positions owe their heritage to Charles Montesquieu, who in the mid-18th century, declared that:

‘the political and civil laws of each nation should be so closely tailored to the people for whom they are made, that it would be pure chance [*un grand hazard*] if the laws of one nation could meet the needs of another...’⁷⁵

Montesquieu’s interpretation of the development of law has found resonance among a large number of theoreticians⁷⁶ all advocating that law corresponds with societal features or is an expression of social interests or needs and that its growth and development are dependent on any number of physical, cultural and political ingredients unique to the particular society it serves.⁷⁷

Socio-legal theoreticians of this persuasion have a shared perception of law not as a Watsonian autonomous entity but as something that is relative, molded by various itinerant features of the society it serves. Law is bound so closely to its habitat by a potent mixture of physical, sociological, cultural and economic forces that it can rarely have validity in any other environment. Twining usefully sums up this contextual view of the relationship between law and society, which submits that:

‘a legal system ... should become part of the landscape rather than appear as an alien imposition; and it should embody and express local values in a coherent fashion. In short it should be in harmony with its context.’⁷⁸

This interdependence between law and society makes the adoption of foreign law problematic. While law may travel, the processes that foster and enable the trip are complicated and multifarious and dependent on stimuli that are more relevant than legal transplants alone for motivating and shaping legal change, such as society, culture, economy,⁷⁹ politics and power.⁸⁰ Context is everything for legal development.

The positivist approach of Watson, which assumes that legal transplants are the very mechanisms of legal change, contrasts sharply with Montesquieu and reductionist perspectives of legal sociology and development which argue that law develops as a

⁷⁵ Charles de Secondat Montesquieu *De L’Esprit des Lois*, Book 1, Ch. 3, Des Lois Positives (1748)

⁷⁶ Watson, A. ‘Society and Legal Change,’ Edinburgh, Scottish Academic Press (1977), p. 3-4

⁷⁷ Ewald, note 66, p.491; Friedman, L.M. *A History of American Law*, 2nd ed. New York: Simon and Schuster (1975), p.12

⁷⁸ Twining, W. *Lecture IV: Generalizing About Law: The Case of Legal Transplants*; The Tilburg-Warwick Lectures, (2000) available at http://www.ucl.ac.uk/laws/jurisprudence/docs/twi_til_4.pdf, p. 46

⁷⁹ Friedman, note 77; Friedman suggests that law is ‘molded by economy and society,’ p. 595

⁸⁰ Kahn-Freund, note 32, p.13.

reflection of social dynamics.⁸¹ These opposing stances have led to occasionally heated academic debate on the relationship between law and society and indeed the value and even existence of legal transplants. Friedman warns that Watson's perspective on legal development 'leads us down a blind alley'⁸² to no more than a 'ludicrous'⁸³ dead end; Abel condemns Watson's judgements as 'vague'⁸⁴ and his reasoning as 'simplistic'.⁸⁵ Even Ewald, one of Watson's more avid supporters, admits to reservations, conceding that the more extreme or 'strong' version of Watsonian theory is 'a menace',⁸⁶ as it relies too much on 'categorical and...one-dimensional'⁸⁷ examinations of private law rules to the extent that it promotes a form of scholarship that is 'bankrupt'.⁸⁸

In addition to controversy surrounding issues such as the value and even the existence of legal transplants there has been considerable academic disagreement about the validity of the legal transplant metaphor as an accurate tool for describing the transfer of law. Is it a sufficiently flexible descriptive mechanism for describing exactly what is going on when law travels from one society to another? Like any metaphor it has its limitations. Friedman regards it as an inappropriate term for what really amounts to a 'diffusion of rules, codes or practices from one country to another'⁸⁹ by processes of begging, borrowing, stealing or imposition brought about by forces of modernisation and industrialisation.⁹⁰ Perhaps it does not adequately capture the realities of what happens with some legal transfers, where ideas and institutions may be imitated at some levels but not at others. Perhaps also the metaphor of legal transplant is too much of a blunt instrument to adequately describe what is going on when law is transferred between different legal systems. Langer prefers 'legal translation' as an explanatory device for analysing the transfer of law, submitting that the transformations that occur when law is transferred are the result of actions taken by translators and legislators or due to differences in procedural language between original and recipient countries.⁹¹ Teubner suggests that actually law is transferred by a process of irritation that prompts a new set of events and a series of transformations in receiving legal

⁸¹ Nelken, D. 'Towards a Sociology of Legal Adaptation' p.7-54 in Nelken, note 18, p. 8

⁸² Friedman, note 18, p.98

⁸³ *ibid*, p. 93

⁸⁴ Abel, R.L. 'Law as Lag: Inertia as a Social Theory of Law' (1982) 80 *Michigan Law Review* 785-809, p.785

⁸⁵ *ibid*, p.788

⁸⁶ Ewald, note 66, p. 492

⁸⁷ *ibid*, p. 509

⁸⁸ *ibid*, p. 492

⁸⁹ Friedman, note 18, p.94

⁹⁰ *ibid*, p.94 -96

⁹¹ Langer, note 32, p.30

systems.⁹² This concept avoids some of the problems associated with the legal transplant metaphor as it can explain how the transfer of a legal rule may stimulate a series of transformations in receiving legal systems. However, because Teubner argues that irritants do not necessarily derive from legal systems external to the system it is irritating, his 'legal irritant' metaphor loses a comparative dimension that makes the legal transplant metaphor such a powerful comparative tool.

It is important to acknowledge the shortcomings of the legal transplant metaphor. Nevertheless, no one metaphor is likely to be able to encapsulate everything that is important about the way law develops. While acknowledging its limitations, the legal transplant metaphor still retains considerable relevance at a theoretical level. It is a valuable heuristic device for explaining the transfer of legal institutions, norms and rules between countries and jurisdictions.⁹³ It is a powerful analytical tool as it enables comparison between transferring and receiving legal systems and between existing and newly transplanted rules, norms or institutions.⁹⁴ It is also a focal point for debate on the wider issue of the relationship between law and society. Although this debate has at times been abrasive and unconstructive, it must nevertheless be welcomed for highlighting both the power and weakness of legal transplantation as a mechanism for legal reform. It also provides valuable lessons on the constraints of legal transplantation as a mechanism for promoting legal change.

2.1.5 Theoretical Lessons

What lessons can be learned from the various theoretical perspectives on legal transplants to help to determine whether the legislators responsible for the ICPC and the CNL were justified in employing legal transplants to reform the criminal law framework in Afghanistan?

Legrand's advice that legal transplants should be regarded by post-intervention law reformers as irrelevant is refuted by considerable evidence demonstrating their existence and longevity across a wide range of subject matter including, as I have noted, criminal law. Overwhelming historical evidence suggests that far from being

⁹² Teubner, G., *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, (1998) 61.1 *Modern Law Review*, 11-32

⁹³ Bowring, B. *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibilities of Politics* Routledge-Cavendish (2008), p.203

⁹⁴ Langer, note 32, p.30

impossible it is certainly possible for criminal law to develop by means of legal transplantation. The same evidence, as well as the variety of motivations for relying on legal transplants to develop law, challenges sociological theories that maintain that law can develop only as a mirror of society. Moreover, as a consequence of the necessity for prestigious or 'quick' law, and of the processes of modernisation and globalisation Montesquieu's assertion that the transfer of culturally embedded laws between nations would be '*un grand hazard*' would seem to be no longer tenable.⁹⁵ Globalising processes, such as international human rights standards, have created world-wide networks of legal reference points which have reduced the interdependence between national cultural identity and legal development and increased the attraction to reformers of transplanting legal solutions to legislative problems.

What of Watson's stance on legal change? His premise that the legal transplant is the one device that accounts for legal development would suggest that those responsible for the ICPC and the CNL were certainly justified in borrowing foreign law. For Watson, law reformers need only consider transplanting law as a means for creating new legislation and developing new legal institutions. The baggage that might be known as 'societal influences' and 'local context' is largely inconsequential.

Although it is perhaps arguable that Watson's conclusions should only have application to the field of private law from which he draws most of his data, his contention that legal transplants are ubiquitous is difficult to rebut. Moreover, Watson's conviction that the antiquity of legal transplants demonstrates that they have been a major source of legal development is supported by the experience of many of the world's criminal justice systems.⁹⁶ His work is undeniably useful for criminal law reformers in post-intervention states in that it at least encourages them to respect legal transplants as potentially viable promoters of legal change.

Where Watsonian theory is less useful is that it fails to properly consider what factors might be important for the successful transplanting of law. For the most part, Watson is non-committal on this issue.⁹⁷ He prefers to concentrate on output rather than outcomes and has generally been more concerned with demonstrating that legal

⁹⁵ Teubner, note 92, p.16

⁹⁶ Damaska, note 1, p. 851

⁹⁷ He is not entirely atheoretical on the issue of transplant feasibility; see McDonough, L. 'The Transferability of Labor Law: Can an American Transplant Take Root in British Soil?' (1992) 13 *Comparative Labour Law Journal*, 504-530; Heim, note 67, p194; Watson, note 69, p. 322

transplants are the primary source of legal development⁹⁸ than with the finer details of what may or may not make them successful sources.⁹⁹ Ultimately, Watson's message for criminal legal reformers in post-intervention states would appear to be this: if you are creating new law you are certainly justified in considering employing legal transplants. In fact, this is how law develops. If you are also concerned about whether or not the new law will actually succeed, there is a presumption that it will, based on the experiences of legal history. The result is a bias towards transplant success and ultimately, a theoretical stance that promotes transplant justification but which is fettered by the obvious criticism of unrealistic prejudice towards the effect and use of the legal transplant mechanism.

If the theories of Watson, Legrand and Montesquieu do not have all the answers to legal development where does this leave us on the issue of transplant justification and the ICPC and the CNL? It is perhaps more advantageous to balance the more constructive features of the various theoretical outlooks on legal transplantation rather than being concerned with their differences. Evidence from criminal law reform in post-intervention states and the motivational rationale for employing transplants supports Damaska's observation that lawyers appear to be naturally inclined to transplant law to promote legal change. Indeed, as Sannerholm maintains 'charged with the task of supporting criminal law reform...an international expert would be hard pressed not to look at models and international benchmarks.'¹⁰⁰

Reformers drafting new law in post-intervention states, such as those responsible for the ICPC and the CNL are, it would seem, justified in considering using legal transplants to develop law, a position that positivist approaches such as Watsons would endorse. However, whether it is realistic for them to go on to do so will depend on their potential for successful reception, an argument that draws on sociological positions that insist that successful legal development is inextricably linked to local context. This premise acknowledges a relationship between law and the society in which it exists. It also acknowledges that law can develop by way of legal transplantation, but that the prospects of it being successfully received are related to local contextual concerns. However, if criminal law reformers are to evaluate the prospects of a transplanted law being successfully received before deciding whether it might be realistic to adopt it, what are the conditions of success? How is transplanted

⁹⁸ Watson, note 63, p. 95

⁹⁹ Twining, note 78, p.40

¹⁰⁰ Sannerholm, note 24, chapter 1, p.2-3

law to be evaluated and what are the variables which might contribute to its successful reception? These issues need to be addressed. The drafters of the ICPC and the CNL may well have been justified in considering using the legal transplant mechanism to develop their laws. But to assess whether it was realistic for them to do so necessitates the application of a suitable evaluative test for these laws to determine whether or not they have been successful.

Section 2.2 Transplant Evaluation: Developing an evaluative test for the ICPC and the CNL

2.2.1 The Conditions of Success

A number of useful theories have been developed identifying the determinants for the successful transplantation of law and suggesting ways in which success can be measured. Kahn-Freund has maintained that not all rules can be successfully transplanted.¹⁰¹ Environmental issues matter and they conspire to create 'degrees of transferability'¹⁰² of legal provisions and institutions. Whether law can be successfully transplanted depends where on a spectrum ranging from 'mechanical' (easy to transplant) to 'organic' (not easy to transplant) they sit. Successful transplants can occur but it is the quality of the political relationship between the donating and recipient countries that determines their success or failure. Some rules which might have a weak connection to the socio-political structure of the society where they exist may be easily transplanted, whereas other rules with close connections to their socio-political environment are less likely to be transplantable.¹⁰³ Successful transplantation, then, depends on new rules being put in the right socio-political plot.¹⁰⁴

Kanda's views on transplant evaluation also emphasise the need to find 'the right plot'. He defines success as the 'use of the imported legal rule in the same way that it is used in the home country, subject to adaptations to local conditions,'¹⁰⁵ and argues that a transplant fails when it is not used or when its application and enforcement result in unforeseen consequences. Success and failure are determined by the 'fit' between

¹⁰¹ Kahn-Freund, note 32, p.27

¹⁰² *ibid*, p.6

¹⁰³ Ewald, note 66, p.495.

¹⁰⁴ Kahn-Freund, note 32, p.11-13; Marsh, N.S. 'Comparative Law and Law Reform', (1977) 41, *Rabel Zeitschrift Fur Auslandsches Und Internationales Privatrecht*, p.664

¹⁰⁵ Kanda, note 3, p.890

the adopted rule and the host environment and the fewer alternatives there are to the transplant, the greater the prospects of success.¹⁰⁶

Other evaluations of legal transplants rely less on comparative analyses between host and foreign countries and are confined more closely to assessments of their acceptance within the host country. Turkey's successful adoption of the Swiss civil code in 1926 depended, according to Lipstein on its 'organisation, education and ... flexible system of administration and judicial practice.'¹⁰⁷ The transplantation of labour exchanges in Holland during German occupation in WWII could be construed as successful, Jettinghoff maintains, relative to the extent to which the Dutch had forgotten the origins of the new rules or institutions.¹⁰⁸ In a similar vein, Harding's review legal development in South East Asia revealed that transplanted laws would successfully 'stick' if they were subject to 'serial cultural absorption and accommodation' in recipient countries.¹⁰⁹

Berkowitz's analysis of the reception of transplanted law in 49 different countries during the 19th and early 20th centuries, a particularly useful contribution to the issue of transplant evaluation, revealed that transplanted law may work successfully if it contains principles familiar to the local population and if it is capable of adaptation by local users.¹¹⁰ From this Berkowitz deduced that the conditions for success are related not so much to the fact that any law is transplanted, but to the manner in which it is introduced. Moreover, Berkowitz surmised, legal transplants that develop 'internally through a process of trial and error, innovation and correction, and with the participation and involvement of users of the law, legal professionals and other interested parties ...tend to be highly effective.'¹¹¹

Berkowitz's findings suggest that law can certainly develop effectively through the process of legal transplantation. However, the processes adopted for transplantation have to be right and these entail proper and due consideration of local context and ownership. In addition, countries which are familiar with transplanted legal concepts are

¹⁰⁶ For a critique, see Dezalay et al, *The Import and Export of Law and Legal Institutions* in Nelken, note 18, p. 242

¹⁰⁷ Lipstein, K. 'Conclusions', *International Social Science Bulletin* (1957) 970-81, p.80-81

¹⁰⁸ Jettinghoff, A. *State Formation and Legal Change: On the Impact of International Politics* in Nelken, note 18, p.99-116

¹⁰⁹ Harding, A. *Comparative Law and Legal Transplantation in South East Asia* in Nelken, note 18, p.213. See also Dezalay, note 106, p. 241-255 ; Mattei, U. 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics,' (1994) 14, *International Review of Law and Economics*, 3-19, p.3; and Garoupa, note 76, chapter 1, p.341

¹¹⁰ Berkowitz, note 51

¹¹¹ *ibid*, p.189

more likely to adopt them successfully and rules capable of being modified to account for local considerations have a better prospect of success. Transplant success is, therefore, essentially a socio-legal concern, dependent on an inter-relationship between law and society.

These findings resonate with those of De Lisle following his assessment of the effect of US legal assistance programmes in former Soviet Bloc countries and China in the 1990's. De Lisle concluded that the successful importation of legal transplants, while tied to their approximation with the legal culture of the importing country, could be facilitated by close collaboration between domestic and foreign legal experts, reliance on local expertise to determine the content of transplanted law and commitment by the importing country to implement its provisions.¹¹²

The conclusions by both Berkowitz and De Lisle are insightful but perhaps their use in the context of assessing criminal law legal transplants, which are the focus of this thesis, is questionable. The majority of the legal transplants observed in both studies involved civil and commercial rather than criminal legislation. This reflects a trend among theories on transplant success and evaluation. None of the aforementioned theories have derived from evaluations of criminal law legal transplants, or indeed those connected to the reform of post-intervention criminal law frameworks. This is potentially significant because there is an important distinction to be drawn between civil law and criminal law transplants which may impact on evaluations of their success or failure. In the former, different forms of procedure are entirely optional, diverse and not subject to determining international precepts. In the latter case, however, all transplantation is subject to the imperative demand to respect international human rights norms. The international human rights framework provides benchmarks for the normative content of criminal law. The provisions which ensure conformity with this framework, and with instruments such as the ICCPR, are not negotiable on 'cultural' grounds but are regarded as an absolute necessity irrespective of the economic, political or sociological environment of the receiving country. To that extent, if provisions included in transplanted criminal law are consistent with international human rights and due process standards, it is generally because they have to be included. There is no legislative choice on this issue. Therefore, it would be difficult to maintain that they should be judged against measurements of 'efficiency' or 'competition' or

¹¹² DeLisle, note 26, 179-308

criticised relative to the extent that they 'find the right plot', 'fit' or have become 'unstuck'.

It would, however, be unwise to dismiss entirely the value of the aforementioned theoretical perspectives on transplant feasibility when trying to develop a suitable evaluative test for post-intervention criminal law transplants. They do not lead to a complete theoretical cul-de-sac but instead carry important messages. Perhaps most noteworthy of all is the fact that most of the premises on transplant evaluation represent revisionist interpretations of Montesquieu's basic assertion that environmental factors are related to the development of law and hence are critical to transplant feasibility. Even Watson appears to make concessions in this respect. In what Ewald alludes to as the 'weak' version of his theory Watson allows for a link between society and legal development.¹¹³ Here, Watson takes a more moderate stance on their inter-relationship, one which accepts that 'no reasonable person would wish to deny that to some extent a people's law is peculiar to it, that the law does reflect that people's desires [and that... it is easy to agree that a legal rule is often the result of social engineering].'¹¹⁴ Perhaps the gap between Watson and his sociological critics on the influence of local conditions on transplant feasibility is not so large. This confirms the premise that success is fundamentally related to local environment.

While this is undoubtedly useful, if we are to find a suitable means of evaluating the reception of transplanted criminal law, including post-intervention criminal law, and understand the variables that might contribute to successful and failed reception, it is constructive to reflect on the experience of criminal legal reform that has involved legal transplantation. This provides further valuable insight into the determinants of transplant feasibility, useful for developing a suitable evaluative test for transplanted law, such as the ICPC and the CNL, designed to reform the criminal law frameworks of conflict states.

2.2.2 Evaluations of transplanted criminal law

Evaluations of the effect of some of the legislation introduced by legal transplants during various law and development and rule of law promotion movements have revealed mixed results. The movement that witnessed the exportation of US law in the

¹¹³ Ewald, note 66, p. 492

¹¹⁴ Watson, note 76, p.4

1970's has been condemned by some commentators as a failure.¹¹⁵ Although driven by well-intentioned US academics and lawyers it was undermined by adherence to arrogant assumptions of the effectiveness of laws and legal systems that were flawed, untested and found ultimately to be unsuitable.¹¹⁶ More recent legislative efforts to promote rule of law in post-intervention societies involving transplanting templates have been criticised as 'disappointing',¹¹⁷ their potential for succeeding reduced by a failure to properly consider the relationship in recipient countries between formal law and cultural norms. Brooks' analysis of rule of law development in Kosovo led her to conclude that 'changes in formal law matter where prevailing cultural norms say that formal law matters. But when formal law has little resonance for people, changes in formal law cannot by themselves create new normative commitments to the rule of law.'¹¹⁸

A number of commentaries on criminal reform involving the transplantation of unfamiliar foreign models into established procedures have also revealed disappointing results. Reichelt suggests that the introduction of plea-bargaining in the Republic of Georgia was a well-intentioned but ultimately ill-conceived transplant largely because it did not have a sufficiently equipped defence bar at the time of the adoption of the new system to render it fair and equitable. Rather than the transplanted procedure achieving the desired effect of reducing trials it increased the potential for corruption and alienated the public against the state justice system.¹¹⁹ A weak defence bar also hampered the successful transplantation of western European and US adversarial procedures into the Russian Criminal Procedure Code in 2001. Drawing from lessons from the Russian experience, Vogler maintains that the imposition of adversariality and due process norms by law on its own is unlikely to bring about significant procedural change.¹²⁰ Alkon reaches similar conclusions with regard to the transplantation of U.S.-style plea-bargaining into the Moldovan criminal justice system and refers to it as a 'transplant failure,' perpetrated by lack of support from local legal professionals.¹²¹

¹¹⁵ Trubek, D.M. and Galanter, M., 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,' *Wisconsin Law Review*, (1974) 1062 -1103, p.1071-1072; Rosenau, J.N. *Turbulence in World Politics: A Theory of Change and Continuity*, Princetown University Press (1990), p.280

¹¹⁶ Trubek, note 115, p.1075-1077; Berkowitz, note 51, p.163

¹¹⁷ Brooks, note 92, chapter 1, p.2285

¹¹⁸ *ibid*, p.2322.

¹¹⁹ Reichelt, J.D. 'A Hobson's Experiment: Plea Bargaining in the Republic of Georgia,' *Journal of East European Law*, (2004) 11(2), p.159-204

¹²⁰ Vogler, note 7. p.185

¹²¹ Alkon, note 15, p.44-45

Other studies on criminal justice reforms involving transplantation offer different insights into and occasionally more optimistic appraisals of transplant feasibility. Krapac suggests that recent criminal law reform conducted by European countries, notably Croatia, involving the adoption of adversarial procedures, has been successful, resulting in better human and defence rights protections that meet international standards.¹²² Krapac also notes that new criminal law in these countries has often been subject to repeated amendment, indicating that legislators' initial choices of transplanted law may not always be realistic and may often be resisted.¹²³ This is supported by the experience of criminal justice reform in Italy. The 1989 Code of Criminal Procedure imported significant adversarial features into Italy's inquisitorial system, but the model intended by the original reformers has since been eroded by the Constitutional Court and legislature. The Italian experience underlines the difficulties of transplanting procedures from different legal traditions.¹²⁴ According to Marafioti 'different legal traditions and cultures foster different responsibilities within a system, thus encouraging different expectations,'¹²⁵ which may impact on whether or not a transplant is successfully received. Cultural resistance to a transplant may adversely affect its prospects of achieving its intended outcome.¹²⁶ The same may be said of a lack of genuine commitment to reform amongst the legal authorities of the host country responsible for applying the provisions of any transplanted law introduced to promote legal change.¹²⁷

Studies have also revealed that the existence (or not) of a culture of legality in the receiving country is also an important variable which can impact on transplant feasibility. No matter how potentially effective a transplanted criminal law may be, its prospects of succeeding is likely to be reduced in societies where the legitimacy of state law and adherence to state concepts of criminal justice are weak. The transplantation of laws to promote criminal justice and rule of law are less likely to be successful in the absence of a commitment to establishing these ideals.¹²⁸

What conclusions can be drawn from these examples of transplanted law to effect criminal justice reform to help determine the manner in which legal transplants intended

¹²² Krapac, note 15, p.141

¹²³ *ibid*, p.124

¹²⁴ Marafioti, note 12, p.91

¹²⁵ *ibid*

¹²⁶ By way of example, the attempts to transplant the English criminal jury system on continental Europe after the French Revolution

¹²⁷ Mertus, note 5, p. 1383

¹²⁸ Miller, note 4

to effect criminal justice reform in post-intervention states should be evaluated? Some criminal law transplants have been successful, while others have encountered reception difficulties, attributable to variables such as the capacity and commitment of legal professionals and the progress of related infrastructural and capacity-building reform efforts. The concept of success generally emerges, however, as controversial and difficult to measure.¹²⁹ It may depend on whose point of view is considered. An international reformer may regard a law that they have drafted, dependent on foreign texts, has been a success merely because it has been enacted, while a judge applying it may regard it as a failure. Furthermore, some aspects of transplanted laws may be successful, while others are not.¹³⁰ It is difficult to judge accurately the effect of any law, let alone transplanted criminal law or the variable that will determine its success or failure. In this regard it is hard not to sympathise with Grazi's experience of 'the ubiquity of uncertainty during transplantation'¹³¹ or to agree with Beckstrom's observation that 'the identification of performance indicators for a transplanted legal system is a perplexing business as best.'¹³²

While acknowledging this, it is nevertheless perhaps useful to note that the experience of legal transplants in the field of criminal law largely confirms Watsonian optimism over the significance of the legal transplantation medium for developing law. They also verify sociological perspectives of the centrality of local environment to legal development. Ultimately, they confirm the premise that law can develop by legal transplantation, but that the fundamental issue of whether or not they will succeed is tied to local contextual concerns. Furthermore, the weight of academic evidence on this field suggests that the criteria that are adopted for evaluating the success of any proposed or actual legal transplant must ultimately be fundamentally related to the environment into which the new law is imported. The same rule of thumb must apply for assessing legal transplants adopted for criminal law reform in post-conflict situations.

2.2.3 An evaluative test for the ICPC and the CNL

What yardsticks should, then, be adopted for evaluating the ICPC and the CNL? As noted, what emerges from evaluative studies of legal transplants in general and from the experience of criminal law reform involving legal transplantation is that local

¹²⁹ Nelken, note 81, p.37-39

¹³⁰ *ibid.*, p. 48

¹³¹ Grazi, et al *The Choice in the Lawmaking Process: Legal Transplants vs. Indigenous Law* (2008) available at <http://ssrn.com/abstract+1130124>; p.5

¹³² Beckstrom, note 3, p.558

environment matters. Success or failure is connected to local contextual concerns such as local ownership, participation and commitment to reform. Evaluations of legal transplants in post-intervention states must therefore be responsive to the idiosyncratic legal requirements of the country concerned at the time of its introduction and during the course of the evaluation, placed in the wider context of its legal traditions, cultural considerations and social, economic and political concerns. These issues, then, must be addressed in the context of Afghanistan and its criminal justice system at the time of the enactment of the ICPC and the CNL and during the period of their application for the purposes of evaluating the success of these laws.¹³³

While these wider issues must be borne in mind, I suggest that two fundamental questions should also be addressed. Firstly, has the legislation established by way of legal transplant been accepted by the local population of the recipient post-conflict country? And secondly, has it achieved the objectives for which it was enacted in the context of the post-conflict situation in which it was introduced?

The issue of a laws 'acceptance' is connected first and foremost to the manner in which it is applied. The choice of appropriate performance indicators for assessing the application of a law will depend on the institutional capacity and infrastructure available to enable data collection. Objective performance indicators such as offending levels, detention rates, prison populations, trial length data, human rights abuses conviction and acquittal rates can be important for assessing the manner in which criminal legislation is being applied.¹³⁴ These quantitative variables are certainly informative. Nevertheless, they are dependent on the availability of reliable data and data collection systems which may not be available or which may make take considerable time to establish in post-interventionist states such as Afghanistan, where the implementation of criminal law has been conditioned by severely damaged infrastructure and institutional capacity.¹³⁵ A key factor, however, in assessing the application of law is gauging the manner in which a law is being applied by local practitioners. Beckstrom's study in Ethiopia noted that 'judges and lawyers practicing new laws are in the front line

¹³³ These matters will be addressed in Chapter 3

¹³⁴ Vogler, note 41

¹³⁵ UNODC reported that 'it is difficult to accurately measure progress [of programmes aimed at strengthening counter-narcotic law enforcement capabilities] because record-keeping and data collection procedures do not always meet acceptable standards and are, in some instances, superficial;' UNODC, *Thematic Evaluation of the Technical Assistance Provided To Afghanistan By The United Nations Office On Drugs And Crime*, (2008) Vol 3, Law Enforcement Programme, available at www.unodc.org/documents/evaluation/2007-afghanistan.pdf, p.12; UNODC, *Afghanistan. Implementing Alternatives to Imprisonment, in line with International Standards and National Legislation*, (2008) available at www.unodc.org/documents/justice-and-prison-reform/Afghanistan_Implementing_Alternatives_Imprisonment.pdf, p.vii

of the confrontation between new laws and the nation. The acceptance and effectiveness of the entire legal order depend in the first instance and for the most part on these men.¹³⁶ The acceptance of transplanted criminal law in conflict states will, it is proposed, be fundamentally linked to the way in which it is being applied by local police, prosecutors, defence lawyers and Judges.

A law is more likely to be applied, and therefore accepted, if it is valued and considered meaningful and appropriate by its local users. Berkowitz suggests that for law to be effective 'it must be meaningful in the context in which it is applied so citizens have an incentive to use the law.'¹³⁷ The more familiar that the legal authorities of the receiving country are with the transplanted legal concepts, the more likely it is that they will be successfully adopted. This resonates with Dezalay's argument that the success of a transplant is tied up in the extent to which the local society will deem it worthy of investment.¹³⁸ It also connects with the work of Brooks on 'norm-change' promotion in rule-of-law projects. Brooks argues that 'formal law will be most successful when its rituals are widely acknowledged as meaningful and appropriate.'¹³⁹

This strand of the proposed evaluative test for legal transplants advocates contemplation about justice being acceptable to the local population. In line with Beckstrom's views on the value of local legal practitioners to legal transplantation, a transplanted law will have an improved prospect of being successful if it is considered meaningful and appropriate by the citizens it affects and the legal actors and law enforcement agents who are applying it. This includes the police, prosecutors, judges and defence lawyers. The more meaningful and appropriate a law is considered to be by this cohort of the local population the easier it will be for them to understand and enforce, improving the prospects of it being successfully transplanted. In evaluating the ICPC and the CNL it will be important therefore, to gauge as far as possible the extent to which this section of the local population consider them meaningful and appropriate in the context counter-narcotics and criminal justice in Afghanistan. It is likely that this will be largely conditioned by the degree to which these two laws are considered to be compatible with the country's established legal order as regards criminal procedure and counter-narcotics. The more compatible a transplanted law is with the established legal order of the host country, the more likely it is to acquire meaning by the local population

¹³⁶ Beckstrom, note 3, p. 561

¹³⁷ Berkowitz, note 51, p.167

¹³⁸ Dezalay, note 106, p. 253

¹³⁹ Brooks, note 117. Brooks uses the term 'norms' to mean 'widely shared attitudes and their associated behavioural imperatives' p.2286

and be considered appropriate for use by them, to the extent that it is accepted and successfully absorbed into the legislative framework for the country.¹⁴⁰ This resonates with the findings of both Berkowitz and De Lisle's studies that advocate close approximation between the legal traditions of an adopting country and a legal transplant in order to ensure the transplantation of effective laws. It is essential, then, to consider these laws closely within the context of the plural legal traditions that make up Afghanistan's criminal justice system.

Assessing the acceptance by the local population of a law transplanted to reform the criminal law framework of a post-conflict country does not in itself provide sufficient information to evaluate whether it has failed or succeeded. It is also necessary to consider a law's objectives and the extent to which they have been achieved. The objectives may be discerned from the reasons behind the development of the law or articulated within its provisions or by those involved in drafting it. If law reformers choose to rely on legal transplants as mechanisms for legal reform it is reasonable to assume that they do so for a reason with specific objectives in mind which they believe the transplanted law can fulfil. An assessment of these identifiable objectives and the extent to which they have been fulfilled allows for consideration of the particular country-specific, post-intervention complexities with which law reformers are faced when drafting new law.

This proposed test urges that transplanted is evaluated within its socio-legal context. Its acknowledges, therefore, that the legal history and traditions of a country will inform the extent to which a transplanted law may be regarded as meaningful and appropriate and that variables such as available infrastructure, development and capacity building can impact on its application and potential for achieving its objectives.¹⁴¹

This test also insists that the motivations for relying on borrowed foreign law, and the identity of the motivators, require analysis because they can affect both the process of transplantation and transplant success. As previously noted, transplants may be employed by law reformers for reasons of expediency and efficiency or to save costs. Grazi has recommended that it is more cost-efficient to 'free-ride on the investments of other jurisdictions' and adopt transplants than to develop laws indigenously.¹⁴² This

¹⁴⁰ Belton, note 29, chapter 1, who maintains that 'while customs without material institutions can manage to uphold some rule-of-law ends...institutions without customs are weak and easily circumvented by raw power'; p.22

¹⁴¹ Krygier, note 94, chapter 1, p.9

¹⁴² Grazi, note 131, p.8

supports positive Watsonian theory that law is autonomous and can develop by transplantation without recourse to the local context of recipient jurisdictions. More than this, in terms of the efficiency of lawmaking, Grazioplene maintains that 'a transplant, even if externally-driven and a poor match to local reality, may be better for society than pursuit of home grown legal solutions.'¹⁴³ This runs against the grain of arguments that lawmaking and in particular that connected to the reform of criminal justice systems is always a cultural endeavour that should be critically attuned to local conditions. However, what is 'better' for a society in terms of efficiency, does not necessarily ensure successful legal reform. As Miller points out, 'cost-savings hardly guarantee success.'¹⁴⁴ Furthermore, law-making that is motivated purely by speed and finances can be associated with negative connotations of 'lazy' lawmaking and legislative reform strategies geared towards quick-fix. According to Miller transplantation of this nature 'involves a drafter who when confronted with a new problem pulls a solution from elsewhere off the shelf of the library to save having to think up an original solution.'¹⁴⁵ Motivations of expediency can result in reduced consideration of local context and needs which may impact negatively on potential transplant success.

I have noted in chapter 1 that post-intervention rule of law reform programmes have been motivated to adopt transplants to modernise criminal justice systems in order to install international human rights standards. Similar modernisation programmes undertaken in Japan in the 19th century and Turkey in the 1920's were nationally-led, whereas recent criminal justice reforms in post-intervention states, including that undertaken in Afghanistan, of which the ICPC and the CNL are examples, have been driven by agents, countries and bodies external to the countries receiving them. Modernising transplanted reform driven by external agents and motivated by international concepts without the endorsement of nationalism may lack legitimacy and, as a consequence, struggle to be accepted by local populations.¹⁴⁶

Modernising legal reform that is 'externally-dictated',¹⁴⁷ and which involves legal transplantation can either be received with gratitude or regarded as an imposition, depending on the circumstances of reform. Imposed legal transplants can certainly result in legal change. The 19th and early 20th century witnessed extensive transplantation of legal systems from European nation states such as England, France,

¹⁴³ *ibid*, p.31

¹⁴⁴ Miller, note 4, p.846

¹⁴⁵ *ibid*, p.845

¹⁴⁶ *ibid*

¹⁴⁷ Adopting Miller's terminology; Miller, note 4

Germany, Spain and Holland to various recipient countries through processes of colonisation and imperialism.¹⁴⁸ The spread of trial by jury is largely the result of British imperialism.¹⁴⁹ The common law jury system was transplanted from Britain to North America in the seventeenth century¹⁵⁰ and was introduced into India in the late eighteenth century.¹⁵¹ British expansionism also led to the adoption of the criminal trial jury in South Africa in 1828 and Australia in 1832.¹⁵² More recently, legislation required to introduce a new criminal procedural code, criminal code and laws on witness protection had to be imposed by Bosnia's high representative in 2002 because the Bosnian Parliament was unable to gain sufficient votes to promulgate these necessary reforms.¹⁵³ International rule of law initiatives, while seeking to benefit the populations of the societies involved are certainly valuable and worthy. Nevertheless, they can also reflect western and more particularly US motivations of promoting stability and combating concerns such as terrorism and international drug trafficking. This can be translated into legislative reform which, on the one hand appears to augment national development, while on the other hand serves western and US foreign-policy stabilisation interests. The requirement for rule of law reform can motivate US legal intervention and indeed hegemony, which has been articulated through agencies such as the United States Agency for International Development (USAID) and CEELI that actively promote US interests by dominating criminal procedure reform. The motivation to extend influence on legislative rule of law and criminal justice reform can result in the transplantation of US-based and western legal models which, as the ICPC and the CNL demonstrate, has been relevant to the Afghan experience following 2001.¹⁵⁴

There is, furthermore, a better prospect of imposed foreign laws promoting the desired technical and societal changes to the receiving countries if a large proportion of the population accepts, understands and implements them.¹⁵⁵ The prospects of them doing so are reduced in situations where they are regarded negatively by local populations and politicised as tools of imperialism and expansion. This is more likely to be the case when the capacity of the receiving states is so weak that they have little choice but to accept the transplanted reforms. The perception of a transplanted law being imposed in

¹⁴⁸ Berkowitz, note 51

¹⁴⁹ Vogler, note 7, p.125

¹⁵⁰ *ibid*, p.126

¹⁵¹ *ibid*, p.129

¹⁵² *ibid*, p.226

¹⁵³ Call, note 3, chapter 1, p.250

¹⁵⁴ In addition to the ICPC and the CNL, a Juvenile Justice Code was introduced in March 2005, and a Law on prisons and Detention Centres in May 2005, both of which were drafted by a team coordinated by the Italian Justice Project Office (IJPO). See UNAMA, *Justice Sector Overview* (April 2007), held on file, p.6

¹⁵⁵ Samuels, note 16, chapter 1, p.12

the interests of foreign colonialism can be increased when law reform is backed by military force, which is often the case during rule of law promotion programmes in post-conflict countries, such as that undertaken in Afghanistan. Visible foreign armies can provide coercive authority for lawmaking, but at the cost of local scepticism and, worse, contempt, which can undermine the effectiveness of transplanted law and ultimately, efforts to promote rule of law. Brooks warns that 'in Afghanistan claims to represent and advance the rule of law will inevitably be contrasted with our often ham-handed use of coercion.'¹⁵⁶

There is perhaps a greater risk of new modernising positive criminal law transplanted to reform state law in a country with plural influences on its criminal justice system being regarded as a foreign imposition when the procedures it introduces are perceived as threatening to non-state legal influences, such as religious or customary practices. Transplanted law may serve only to highlight and increase the differences between the competing systems of justice resulting in greater polarisation between the adherents to them.¹⁵⁷ Perhaps some prior account needs to be taken, therefore, of the extent of the impact that transplanted state criminal law, such as the ICPC and the CNL, will have on other legal traditions affecting criminal justice. If not, according to Suhrke this form of modernisation risks amounting to 'a form of Western dominance that leaves the recipients little genuine choice and delivers destructive forms of development.'¹⁵⁸

The motivations for relying on legal transplantation can, then, have implications for the process of making law by transplantation and on transplant reception. The need for urgent and expedient legal reform can motivate legal transplanted solutions but at the risk of limited consideration for local context and legal traditions. The requirement for modernisation can also motivate legal transplantations, but at the risk of creating law perceived locally as an imposition, particularly when combined with a foreign military presence. Moreover, if reformers are motivated to rely on legal transplants to develop law in countries with plural legal traditions greater sensitivity towards the complexity of the relationship between the various sources of law may be required. Without any consideration of these consequences, legal transplants risk developing into 'lethal' transplants that can promote injustices as opposed to justice. These issues also demand analysis in the context of my proposed evaluative test.

¹⁵⁶ Brooks, note 117, p.2328.

¹⁵⁷ Weinbaum, M.G. 'Legal Elites in Afghan Society' *International Journal of Middle Eastern Studies*, (1980) 12(1), 39-57; p.24

¹⁵⁸ Suhrke, note 42, p.1293

This is an original test designed to achieve a balance between the positivist position of Watson, which emphasizes the practical utility of legal transplants as means for developing logically applied legal rules, and socio-legal viewpoints, espoused by commentators such as Kahn-Freund, Kanda and Milhaupt and Berkowitz, which highlight the impact of legal traditions, legal culture, local participation, economy and politics on transplant success.

It brings both of these positions together. Those limbs of the test that consider a law's application relative to objective performance indicators and the extent to which it has achieved its objectives require positivist examinations of the law's provisions as logically applicable rules and the collection of quantitative data to measure its application performance. The other limbs of the test which explore the extent to which a law is considered meaningful and appropriate to the legal actors responsible for enforcing it and the manner in which it is being applied by them require socio-legal inquiries into variables such as compatibility with legal tradition, local interpretation, capacity, training, commitment to the law and social, political and economic concerns. The success of a transplanted law can be gauged by taking an overall perspective following assessments of all limbs of the test. The greater the extent to which a law has been accepted and achieved its objectives the more successful it will have been.

Conclusion

The number and variety of motivational forces for legal transplantation underlines the practical significance of legal transplants for criminal law reformers and their importance as a form of legal development.¹⁵⁹ Moreover, the overwhelming historical evidence that legal transplants have been responsible for the development of new criminal law for a considerable period of time in many of the world's criminal justice systems demonstrates that it is, as Damaska has observed, 'natural' for legislators to rely on them, particularly when engaged in the reform of criminal law frameworks of post-intervention states. Indeed, the ubiquity of legal transplants in the field of criminal law implies that it would be bad practice not to consider them as vehicles for developing new law. As Jhering cautions 'no one bothers to fetch a thing from afar when he has a good or better at home, but only a fool would refuse quinine because it didn't grow in his back garden.'¹⁶⁰ While academic literature on legal transplantation

¹⁵⁹ Kanda, note 3, p.889

¹⁶⁰ Jhering, K. 'Geist des Römischen Rechts' Vol 11955 p.8-9; Xanthaki, note 62, p. 659

reveals fundamental disagreement over transplant existence and feasibility, which reflect differences of opinion on the wider relationship between law and society, the more constructive aspects of these conflicting theories suggest that criminal law can certainly be developed by legal transplantation. Taken together, these factors would suggest that post-intervention advisors looking for solutions to legislative dilemmas when drafting new criminal law, such as the ICPC and the CNL, are justified in considering employing the legal transplant mechanism.

Assessing whether it was actually reasonable for the legislators responsible for the ICPC and the CNL to proceed to develop these laws by legal transplantation demands the application of a suitable evaluative test in order to determine whether or not they have been successfully received in Afghanistan. The weight of evidence from evaluative studies of criminal law and theoretical assessments of transplant feasibility suggests that the success or failure of legal transplants will be intimately related to the local contextual concerns of the receiving countries at the time of their introduction and, subsequently, during their application. Bearing this in mind, it is proposed that an evaluation of the ICPC and the CNL necessitates assessing the extent to which they have been accepted and achieved their objectives. This entails examining the manner in which they have been applied by local legal practitioners, whether they are regarded as meaningful and appropriate, the motivations behind their enactment and whether their objectives have been realised. In order to apply this test to these two laws and examine these variables it is essential, precisely because of the acknowledged influence of local concerns on transplant reception, to examine them within the context of the environment into which they were introduced in Afghanistan between 2004 and 2005 and during the period of their application.

3 Criminal Justice in Afghanistan: Context, Reform and Contemporary Realities

Introduction

I have suggested in chapter 2 that while legal transplantation can be employed to develop post-intervention criminal law, the reasonableness of adopting this reform tool can be assessed relative to the successful reception of the new legislation it helps to create. This can be measured with reference to the extent to which the law is accepted and achieves its objectives. These variables in turn will be affected by local contextual issues which influence the application of criminal justice in the adopting country at the time of the adoption of the law and during the period of its application. As a consequence, understanding the criminal justice system into which transplanted criminal law is introduced and is enforced is indispensable to evaluate its reception and determine how legitimate and reasonable it was for it to have been developed by means of legal transplantation.¹

This chapter examines criminal justice in Afghanistan. It is organised in five sections. Section 3.1 considers the early political reform following US military intervention in October 2001. Section 3.2 examines the legal traditions which influence criminal justice in Afghanistan and both procedural and substantive customary and Islamic criminal law. Section 3.3 reflects on the development of Afghanistan's state criminal justice system by the absorption of Islamic law, constitutional reform and the codification of positive law, which involved the transplantation of foreign legal models. Section 3.4 examines the nature of existing applicable state criminal procedure and substantive law in 2001 and documents the progress of post-intervention reform with regard to legal education, capacity building and the reconstruction of the justice sector. Finally, section 3.5 considers relevant cultural factors which may affect the reception of transplanted laws such as the ICPC and the CNL and outlines some of the key challenges facing the state criminal justice system that may constrain their successful application.

¹ Bowring, note 93, chapter 2, p.196-198

Section 3.1 Early post-intervention reform

Following the removal of the Taliban from power in December 2001 Afghanistan was, according to one report, 'a truly devastated state with its human, physical and institutional infrastructure destroyed or severely damaged.'² Against this background the international community embarked on a programme of reform. Consequently, the UN convened a conference in Bonn where agreement was reached on establishing a framework for the political, constitutional, governmental and legal reconstruction of the country. This 'Bonn Agreement' set a path for political reform which it determined should be undertaken with an adherence to 'the principles of Islam, democracy, pluralism and social justice,'³ which the delegates felt would best serve Afghanistan's future political interests. To this extent it set out a procedure for the establishment of an interim administration and a timetable for the transition of power from what was to become the Afghan Interim Authority (AIA) to a fully representative government.

Following influential lobbying by the United States, Hamid Karzai, a Durrani-Polpolzai Pashtun tribal leader, was selected as the leader of the Interim Authority. It was proposed that the AIA would rule for 6 months pending the convention of an Emergency *Loya Jirga* which would within that timescale elect members to a new Afghanistan Transitional Authority. Alongside this, the Bonn Agreement called for a Constitutional *Loya Jirga* to be convened within 18 months⁴ of the establishment of the Transitional Authority to assist in the creation of a new Constitution and for presidential elections to be held within 2 years of the first Emergency *Loya Jirga*.⁵ The Emergency *Loya Jirga* duly took place in June 2002⁶ and soon after a Transitional Administration was created with elected members and Karzai installed as its President.⁷

In addition to establishing an early political road map, the Bonn Agreement sought to provide a legal framework for Afghanistan in the context of its immediate post-intervention future which would have ramifications for the administration of criminal justice and indeed

² Afghanistan National Development Strategy (ANDS) 2008 available at www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, p.3; see Appendix 1 for details of the ethnic composition of Afghanistan's society and the history and damaging repercussions of conflict in the country from 1979 to October 2001

³ Preamble to Bonn Agreement, 5 December 2001, S/2001/1154, p.2

⁴ *ibid*, article I, 6

⁵ *ibid*, article I, 4

⁶ Goodson, L.P. 'Afghanistan's Long Road to Reconstruction,' *Journal of Democracy*, (2003) 14(1), 82-89

⁷ Saikal, A. 'Afghanistan after the *Loya Jirga*,' *Survival*, (2002) 44(3), 47-56, p.48

for the development of the ICPC and the CNL. Afghanistan's state criminal justice system had not escaped the devastation caused by Soviet occupation and civil war. By 2001 it was, according to the UN, 'effectively non-existent.'⁸ Judicial buildings had been damaged, judicial and legislative administration was deficient and correctional facilities were poor or absent in rural areas. Moreover, no complete record of the country's criminal laws existed. As a guideline for the reconstruction of Afghanistan's criminal justice system, Bonn recommended that reform should be undertaken 'in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.'⁹ Under this ideal legislative reform of the criminal law framework would have to be compatible with international human rights instruments ratified by Afghanistan and seek some form of articulation with the plural legal traditions which inform criminal justice in the country. To understand the reasoning behind this guidance it is essential to examine the legal traditions to which criminal justice owes its heritage in Afghanistan.

Section 3.2 Legal Traditions and Criminal Justice in Afghanistan

There have been three distinct legal traditions that have shaped criminal justice in Afghanistan. These consist of a mix of social norms and traditions practised as customary law, legal rules enacted by state legislation and Islamic religious law. Each of these legal traditions influencing criminal justice practices has distinct substantive and procedural norms. Before the introduction of positive codified law by the Afghan state in 1923 during efforts to create a centralised criminal justice system, the primary cultural materials creating the norms that constituted Afghan 'criminal justice' were Islamic law ('*Shari'a*') and local customary and tribal law (*rawaj*), particularly *pashtunwali*. The state system developed during programmes of modernisation undertaken by various rulers and by means of Constitutional reform and the introduction of codified law of a predominantly civil law tradition. Aspects of *Shari'a* were absorbed as legitimising tools. These plural legal traditions co-exist alongside each other but the state system has occasionally met with resistance from adherents to Afghanistan's other legal traditions and its appeal has historically been conditioned by the extent to which the centralised state has been able, or unable, to extend its power and control from urban areas to the countryside, where the majority of Afghans have always lived. These issues require further examination as they

⁸ UNODC, *Thematic Evaluation* note 135, chapter 2, p.1

⁹ Bonn Agreement, article II, 2

have implications for the potential reception of laws such as the ICPC and the CNL, transplanted only to assist the development of the state criminal justice system.

3.2.1 Customary approaches to criminal justice

Afghanistan's customary law developed from a need by communities to create and maintain norms and rules to regulate and control behaviour amongst themselves and with other social and tribal groups. Tribal allegiances and geographical remoteness combined to create introspective and conservative communities that became self-sufficient in administering justice as a means of maintaining community cohesion.¹⁰ The legal norms that developed derive from local customs, tribal laws, Islamic law and state law and vary in accordance with the multi-ethnic and segmented nature of Afghanistan's largely rural population, resulting in different regional customary legal practices.¹¹

Numerous informal mechanisms for dealing with criminal matters have evolved, the most common of which are the *jirga*, frequently used in Pashtun areas, and the *shura* which operate in Afghan Uzbek, Tajik and Hazar localities.¹² There are substantive and procedural variations of the criminal law and practices interpreted and applied by these justice councils. Pashtun *jirgas* are inclined to be *ad hoc* gatherings convened to deal with a particular criminal offence, whereas *shuras* have a more fixed status and are generally attended by a permanent membership who hold regular meetings.¹³ On the whole, however, there are extensive conceptual similarities between them¹⁴ and they usually involve a gathering of local people or elders (*marakachian*) to reach a collective binding decision (*prika*) that will result in the resolution of a dispute by reference to local interpretations of *Shari'a* and unwritten penal tribal customary codes.¹⁵

¹⁰ ILF, *The Customary Laws of Afghanistan*, New York/Kabul: ILF, (Sept. 2004) available at <http://www.theilf.org/Customary%20Laws.pdf>, p.35

¹¹ USAID, *Afghanistan Rule of Law Project Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* (30 April 2005) available at http://pdf.usaid.gov/pdf_docs/PNADF590.pdf, p.4

¹² ILF, note 10, p's 21, 35 and 51.

¹³ Glatzer, B. (2002) *The Pashtun Tribal System* in Pfeffer et al, *Concept of Tribal Society. Contemporary Society: Tribal Studies*, vol. 5 (2002) New Delhi: Concept Publishers, p.265-282, p.272.

¹⁴ Wardak, A. *Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan* available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017434.pdf>, p.4

¹⁵ UNDP, *Building Modernity*, note 26, chapter 1, p.92

3.2.1.1 Customary approaches: procedural issues

Jirgas and *shuras* are predominantly held in open areas or at local mosques.¹⁶ Adjudicating members are exclusively male.¹⁷ They do not require professional qualifications, but must command local respect, acquired perhaps through a reputation within the community for expertise, honesty and ability or because of their recognised influential status.¹⁸ Members are volunteers rather than elected or appointed representatives¹⁹ and there are no prescribed rules on the number of people required for any *jirga/shura* to be convened or on the length of the proceedings which may last anytime from hours, days and weeks depending on the nature of the issue in question.²⁰

At the commencement of *jirga/shura* proceedings cash or property (*machilgha* or *baramta*) is collected from the parties to the case and given to a trusted third-party for safe-keeping. This acts as a form of surety which may be forfeited if a party refuses to abide by the judgement that the *jirga/shura* reaches.²¹ Proceedings may then commence with each member of the *jirga/shura* 'sharing short stories, narratives, examples and proverbs'²² following which the matter in question is openly discussed. Alleged offenders and victims may be represented or argue their own cases. In forming a judgement *jirga/shura* members may choose to rely on previous decisions handed down through the generations that have become established as general rules with precedential value (*tseyal*).²³ On criminal issues they will refer to interpretations of *Shari'a* and unwritten customary penal laws to assist them in reaching a conclusion to proceedings. *Jirga/shura* decisions, communicated orally, are reached by consensus²⁴ and to that extent are considered binding only when they are deemed to be fair by all participants, including the victim and the offender.²⁵

¹⁶ WCLRF, *Bad Painful Sedative* (2003), chapter 3, available at http://www.wclrf.org.af/English/eng_pages/Researches/Badpainful/badpainful.htm

¹⁷ Drumbl, note 91, chapter 1, p. 383

¹⁸ Jones-Pauly, C. And Nojumi, N. 'Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan (2004) 52, 4, *American Journal of Comparative Law*, 825-858; p. 836; UNDP, note 16, p.92

¹⁹ Drumbl, note 17, p. 382.

²⁰ Glatzer, note 13, p.272

²¹ ILF, note 10, p.8

²² *ibid*

²³ *ibid*, p.9

²⁴ Rubin, B.R. (1995) *The Fragmentation of Afghanistan. State Formation and Collapse in the International System*, Yale University Press, p.3

²⁵ They differ from criminal cases settled in *maraka* proceedings which are dependent on the judgment of one person, the *marakachi* who, although usually illiterate, is chosen for his perceived expertise in settling disputes; WCLRF, note 16, chapter 3

Aggrieved participants are entitled to appeal to another *jirga* against an unfair *prika* and there is a right for a third review by *jirga* (*takhm*), where the decision reached is considered final.²⁶ Failure to adhere to this judgement may result in a range of punishments decided upon by the community or tribe which may vary from cash fines, the burning down of the guilty party's house and, most serious of all, expulsion from the tribe.²⁷ The enforcement of decisions is generally the responsibility of a select group of individuals within communities known as *arbakai* whose authority is absolute and normally provided with the consensual support of local commanders.²⁸

3.2.1.2 Customary approaches: substantive issues

In majority Pashtun areas the predominant customary code for regulating traditional criminal justice norms is *pashtunwali*. Other ethnic groups rely on their own local customs to inform their approaches and decisions on criminal justice issues.²⁹ *Pashtunwali* is an integral aspect of Pashtun social identity, providing a code of honour and behavioural practice which permeates into decision-making and procedure in informal Pashtun approaches to criminal justice and which often supersedes both Islamic and governmental dictates.³⁰

Traditional *pashtunwali* attitudes towards criminal justice provide for retributive penalties that enable the victims of crimes and their families to pursue justice by way of a blood feud. However, retaliatory punishments may in some cases be avoided by demonstrating contrition through the payment of compensation (*poar*) to the victim or their family and seeking their forgiveness (*nanawati*).

Appropriate levels of *poar* are determined with reference to tribally-prescribed damages (*nerkhs*) established relative to the nature of an offence. These involve not only cash transactions, but also the provision of services, the transfer of livestock and, of more

²⁶ ILF, note 10, p.9

²⁷ Glatzer, note 13, p.272

²⁸ *ibid*

²⁹ Drumbl, note 17, p. 381

³⁰ Carter, S. and Clark, K. *No Shortcut to Stability. Justice, Politics and Insurgency in Afghanistan*, Chatham House, (2010) available at www.chathamhouse.org.uk/publications/papers/view/-/id/985, p.7

concern, the handing over of women, a process known as *baad*.³¹ Crimes against property require a special *poar* involving the return of stolen items and additional damages known as *sharm*.³² *Poars* for assault-related crimes typically vary depending on the part of the body that is injured and the extent of the assault (Table 1).

In addition to honouring the judgement of the *jirga* regarding appropriate *poar* penalties, perpetrators of crimes may be required to seek forgiveness from the victim or their family. The custom of forgiving, or *nanawati*, involves the seeking and acceptance of admission and pardon and is rooted in principles of restorative justice rather than the retributive justice commonly practiced in most western criminal justice systems.³³ It aims to reduce enmity and foster reconciliation in a manner that allows for the reintegration of the perpetrator within their community following their public accountability for the crime and in the light of their noticeable adherence to the judgment of the *jirga*.³⁴ The action to be taken to achieve a pardon varies relative to the offence and there are also tribal and regional variations relative to the amount and type of compensation that might be payable for any particular offence, a consequence of the oral communication and non-codification of customary legal norms.³⁵

Afghanistan's customary approaches to criminal justice frequently attract criticism as being discriminatory, for lacking transparency and for failing to meet international standards of due process. No written records of proceedings are kept, hindering transparency. The male exclusivity of *jirgas/shuras* discriminates against women and some of the punishments that are meted out promote their subjugation. Furthermore, the vulnerability of *jirga* proceedings to abuse and coercion by warlords inhibits due process.³⁶

The criticisms of discrimination, coercion and arbitrariness are not unique to Afghanistan's customary justice system but are typical of those often directed at justice systems based on popular participation. It is, nevertheless, important to acknowledge the global attraction

³¹ For details on tribal *baad* penalties relative to particular criminal offences see Drumbl, note 17, p.385; ILF, note 10, p.11-13

³² ILF, *ibid*, p.16

³³ Rzehak, L. *Doing Pashto. Pashtunwali as the ideal of honourable behaviour and tribal life among the Pashtuns*, Afghanistan Analysts Network (2011) available at <http://www.aan-afghanistan.org/index.asp?id=1567>; p.18. For additional information see Appendix 2

³⁴ UNDP, note 15, p.95; ILF, note 10, p.10

³⁵ Rzehak, note 33, p.18.

³⁶ Wardak, A. 'Building a post-war justice system in Afghanistan,' (2004) 41 *Crime, Law & Social Change*, 319-341, p.328; see also Appendix 2

of popular justice mechanisms and that justice systems of this nature have received international validation.³⁷ Furthermore, on a local level, customary procedural and substantive criminal law and the institutions in which they are conducted continue to be vital parts of the fabric of Afghan life, regulating social behaviour and attitudes towards crime. The United Nations Development Programme's (UNDP) Human Development Report noted that 82 % of respondents considered *jirgas/shuras* to be 'fair and trusted' and 'effective at delivering justice.'³⁸ The same respondents also found these informal institutions for resolving disputes to be more accessible, less corrupt and better able to promote human rights than the state justice system. In addition, Asia Foundation noted in 2008 that 'a significant proportion of the Afghan population still relies on informal tribal or traditional systems of justice to address issues of crime.'³⁹ Afghans clearly have confidence in the informal justice system and its means and methods of resolving criminal disputes, which do not involve paperwork, lengthy delays, travel and costs and which result in decisions that, although based on a retaliatory ethos, are essentially restorative in nature and tied to the collective consciousness of their communities. Typical of traditional justice systems globally, Afghanistan's substantive customary approaches to criminal justice are motivated by the need to promote reconciliation between the families of victims and offenders in an effort to restore balance and cohesion within the community.⁴⁰ To that extent the system remains both meaningful and appropriate to victims, offenders and the communities in which they live, all of which contributes to sustain its legitimacy.

3.2.2 Islamic Approaches to Criminal Justice

Given that 99% of Afghanistan's population are Muslim it is perhaps not surprising that Islam is a central feature of Afghan society.⁴¹ Amongst Afghanistan's tribally and ethnically factionalised society, adherence to Islam remains one common feature shared by the majority. It is a powerful regulating aspect of Afghan life, providing a means of cultural

³⁷ Popular justice models exist in many countries, for example, Chile, Ghana, Somalia and Rwanda. The Dakar Declaration (11.09.1999) extended the Banjul Charter on Human and People's Rights to include traditional courts; Vogler, note 103, chapter 1, p.255-262

³⁸ UNDP, note 15, p.96

³⁹ Asia Foundation, *Afghanistan in 2008. A Survey of the Afghan People* (2008) available at <http://asaifoundation.org/publications/pdf/418>, p.75

⁴⁰ Thorne, K. *Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia* (2005), Centre for Humanitarian Dialogue available at <http://www.hdcentre.org/files/imperfect%20bodies.pdf>, p.3-5

⁴¹ Mendoza, K. *Islam and Islamism in Afghanistan* (2003), 1-19, available at <http://www.harvard.edu/programs/ilsp/research/mendoza.pdf>, p.2

identity, a basis for social morality and a rubric of laws to regulate behaviour and guide concepts of justice.⁴²

3.2.2.1 Islamic approaches: substantive issues

The Islamic faith is thought to have first emerged in Afghanistan in the early seventh century.⁴³ *Shari'a*, the generic term for Islamic law and criminal justice, has its origins, it has been suggested, in the customary norms and practices of Bedouin tribal communities in the Arabian peninsular⁴⁴ and some of *Shari'a* procedural practices such as collective responsibility for criminal behaviour⁴⁵ and punishments that allow for compensatory penalties are thought to have emanated from customary tribal approaches to justice, reflecting an inter-relationship between these two central Afghan legal traditions.⁴⁶

Alongside its customary roots *Shari'a* purports to derive from a divine source, namely the *Qu'ran*, which contains legal directions (*Hadiths*) claimed to have been made by Allah to the Prophet Mohammad between 610-632.⁴⁷ As a primary source of *Shari'a*, the *Qu'ran* is supported by the *sunnah*, the recorded deeds and words of the Prophet Mohammad. Only a small proportion of the *Qu'ran* and the *sunnah* contain legislative material. It is thought that between 80 to 500 out of more than 6000 verses in the *Qu'ran* refer to legal issues and that of these, only 30 are linked to criminal law and 20 to criminal procedure.⁴⁸

Although the *Qu'ran* and the *sunnah* contain limited specific content on criminal issues, they nevertheless provide general reference points for interpretation and analysis. Following the death of Prophet Mohammad, *caliphs* (leaders of the Muslim community) and *sohaba* (the associates of Prophet Mohammad) appointed consultants to assist them in interpreting the *Qu'ran* and the *sunnah* to apply rules to new situations to which they did not specifically refer.⁴⁹ From this process there emerged the two central secondary sources of *Shari'a*, namely *qiyas* and *ijima*. *Qiyas* is a form of reasoning by which Islamic scholars deduce answers to legal questions by way of analogy from similar cases in the

⁴² Etling, note 38, chapter 2, p.2

⁴³ Mallat, C. 'From Islamic to Middle Eastern Law A Restatement of the Field (Part I)', (2003) 51, *American Journal of Comparative Law*, 699-750, p.701

⁴⁴ Vogler, note 37, p.106

⁴⁵ Such as compensation payable by an offenders family; Mallat, note 43, p.702

⁴⁶ Schacht, J. *An Introduction to Islamic Law* (1964) Oxford University Press, p.186

⁴⁷ Vogler, note 37, p.106

⁴⁸ *ibid*

⁴⁹ Wardak, note 36, p.324

Qu'ran or the *sunnah*. *Ijima* or 'consensus' refers to a process by which decisions reached by Islamic jurists on a new situation acquire a binding authority.⁵⁰ The outcomes of *qiyas* and *ijima* became recorded statements of law comprising a valuable source of Islamic jurisprudence alongside interpretations of the *Qu'ran* and the *sunnah*.⁵¹

Islamic legal scholars (*ulama*) are recognised in Afghanistan as legitimate authorities of *Shari'a* and as reference points for reaching decisions on disputes, including criminal matters in the context of Islamic law. Some also qualified as judges (*qadi*) in state Courts.⁵² They have a recognised status as qualified interpreters of *Shari'a* acquired following instruction at religious schools (*madrasa*). Their primary legal resource are *fiqh*, which are textually-based rules of an Islamic school of law gathered from the most venerated Islamic scholars up until the late medieval period. The *Sunni* Hanafi school has emerged in Afghanistan as the more dominant of the religious interpretations for demographic reasons, as the *Sunnis* comprise an estimated 80%-85% of the Muslim population. The remaining 15% to 20% *Shiite* community are largely followers of the Jafari jurisprudential school.⁵³ Because of the majority status of the Sunnis, Hanafi *fiqh* provide the basis for Afghan Islamic criminal justice.

3.2.2.2 Islamic approaches: procedural issues

In Islamic criminal justice, the nature of the offence is central to the determination of procedure, evidence and punishment. Offences are categorised as *hudud*, *quesas* or *tazir*, depending on their nature and attract punishments of varying degrees of severity depending on whether they are considered forbidden (*haram*) or reprehensible (*makruh*).⁵⁴ *Hudud* offences derive from the *Qu'ran* and include adultery, false allegations of unlawful intercourse, apostasy, highway robbery, alcohol consumption, theft and rebellion.⁵⁵ They generally require evidential proof in the form of confessions or the oral testimony of a set number of witnesses, usually numbering two and rising to four in the case of adultery.⁵⁶

⁵⁰ Vogler, note 37, p.106

⁵¹ Wardak, note 36, p.324

⁵² *ibid*

⁵³ *ibid*, p.323

⁵⁴ Vogler, note 37, p.109

⁵⁵ Mallat, note 43, p.721

⁵⁶ Vogler, note 37, p.109

They attract mandatory sentences, leaving no room for discretion by judges. Penalties include public flogging,⁵⁷ stoning,⁵⁸ the amputation of limbs⁵⁹ and death by decapitation.⁶⁰

Qesas offences are assault-related crimes and include murder and intentional or unintentional bodily harm. They attract retributive penalties including corporal punishment for intentional murder, although there are optional alternative sentences of compensation by transferring money or property (*diat* and *irsy*) which allow some element of judicial discretion. However, in these cases it is the wishes of the victims or their families that determine sentencing outcome.⁶¹

Tazir offences are undefined by religious legal sources and include offences such as fraud, forgery and sodomy for which discretionary punishments are exacted depending on the will of the *qadi* and the community.⁶²

Criminal proceedings under *Shari'a* are usually commenced by a claim made by the injured party against another person. Pre-trial procedure and investigation is modest and normally limited to enquiries by the *qadi* as to the character of the accused.⁶³ The proceedings at the trial hearing are led by the *qadi*. In normal circumstances both the complainant and the defendant represent themselves. There is no provision in the *Qu'ran* for defence representatives.⁶⁴ The complainant is responsible for producing evidence and witnesses to support their accusations against the accused whose presence at the hearing is obligatory. The evidence required to establish culpability normally involves either a confession by the defendant or the oral testimony of a sufficient number of witnesses. The cross-examination of witnesses and prosecution evidence is confined to the *qadi* who ultimately reaches a decision based upon his understanding of the evidence and interpretation of the sources of *Shari'a*. With no prescriptive system of *stare decisis* Islamic judges are not confined to adhering to precedential rulings when reaching judgements on cases.⁶⁵ Instead, they rely on their interpretation of the authoritative sources of Islamic law

⁵⁷ false allegations of unlawful intercourse and drinking alcohol

⁵⁸ adultery

⁵⁹ theft – which may be of a hand or foot and highway robbery

⁶⁰ apostasy and highway robbery

⁶¹ Vogler, note 37, p.110

⁶² *ibid*

⁶³ *ibid*, p.111

⁶⁴ *ibid*, p.112

⁶⁵ Etling, note 42, p.5

and *fiqh* to reach decisions and formulate rules (*ijtihad*) that have application to the case in question. Therefore, according to Weiss, 'the Muslim jurist never invents rules; he formulates, or attempts to formulate, rules which God has already decreed and which are concealed in the sources.'⁶⁶ Once the *qadi* has reached a decision it is considered final as there is no system of appeal within Islamic criminal procedure.⁶⁷

Sharia criminal justice procedure is essentially inquisitorial. The juryless proceedings are led and controlled by the *qadi* whose role is to ascertain the truth and pass judgement. The procedure is highly dependent not only on witness evidence but also on confessions extracted from the accused, who remains a largely submissive presence in the proceedings, lacking the authority to cross-examine witnesses or the complainant. It is these qualities, coupled with a retributive punishment system that embraces physical penalties that combine to result in it being frequently regarded as excessively authoritarian and lacking in the international human rights and due process standards rights that afford some measure of protection for defendants in most western adversarial criminal justice systems. Farrar derides Islamic justice as 'authoritarian, medievalist and completely unsuited to the demands of the modern nation state.'⁶⁸ Such a view, however, runs the risk of representing a depreciatory and caricaturist exaggeration of Islamic jurisprudence that overlooks the centrality of many tenets of international human rights law to *Shari'a*.⁶⁹ Indeed, Islamic justice has been vigorously defended as having in-built human rights protections which prevent, for example, pre-trial detention and torture to extract evidence and which also endorse the defendant's right of silence and the presumption of innocence.⁷⁰

The Islamic model of criminal jurisprudence is, nevertheless, clearly at odds with western adversarial models. It also contrasts with criminal justice systems that depend on formulistic and codified legislative rules. The Islamic system of justice centres on the endeavour of an individual to reach a decision based upon the subjective interpretation of religious sources as opposed to western concepts of justice that allow for objective analysis of prescriptive written laws. According to Vogel, the 'western concept of law is that

⁶⁶ Weiss, B. 'Interpretation in Islamic Law: The Theory of Ijtihad,' (1977-1978) 26, *American Journal of Comparative Law*, p.199-212, p.200

⁶⁷ Vogler, note 37, p.113

⁶⁸ Farrar, S.A. Islamic Jurisprudence and the Role of the Accused: A Re-examination (2003) 23(4), *Legal Studies*, 586-604, p.587

⁶⁹ Drumbl, note 17, p. 367

⁷⁰ Vogler, note 37, p.114

it is a system of formal, objective, publicly known, generally applicable, compulsory rules, whether determined from general, published legislation, from the decisions of courts interpreting legal materials and applying them, or from authoritative scholarly analyses of legislation, court decision, and other sources of law. So far we have seen little in Islamic law that resembles this concept.⁷¹ Afghanistan's various rulers have had to confront the problem of how to align the country's firmly established Islamic legal tradition with the need to create a centralised state criminal justice system. This has been a difficult process for Afghanistan, undertaken adopting the tools of codification and transplantation and producing mixed results.

Section 3.3 The Development of the Afghan State Criminal Justice System

Islamic law has remained a pervasive presence that has underpinned both the creation and development of the Afghan state and its criminal law system. Afghanistan's various rulers since the inception of the state, from its monarchs to its republican presidents, have all recognised its importance not only as a regulating and unifying tool that might ensure stability in a highly factionalised society, but also as a means of attaining legitimacy in an overwhelmingly Muslim state. Consequently, *Shari'a* has been absorbed into formal criminal jurisprudence since the first attempt to establish a centralised legal system in the 19th century. The processes that enabled this were Constitutional reform and the codification of positive law.

These two processes have often worked in tandem, activated by renewed political upheaval and reform, which has been considerable in Afghanistan. The country has witnessed 11 changes of regime between 1923 and 2004, 8 of which occurred in the 28 year period from 1973 to 2001.⁷² During the same period nine different constitutions have been promulgated, five of which have been accompanied by new criminal legislation.⁷³

⁷¹ Vogel, F. *Islamic Law and Legal System: Studies of Saudi Arabia*, Leiden: Brill (2000), p.22

⁷² See Lau, M. *Afghanistan's Legal System and its Compatibility with International Human Rights Standards*, International Commission of Jurists, (2002) available at <http://www.icj.org/IMG/pdf/doc-51.pdf>, p.28-35

⁷³ The 1924-5 Penal Code after the 1923 Constitution, the 1965 Criminal Procedure Code after the 1964 Constitution, the 1976 Penal Code and the 1977 Constitution, the 1979 Constitution and 1979 Law on the Discovery and Investigation of Crimes and Supervision of the Attorney General on its Legal Enforcement, and the 2003 Criminal Procedure Code and the 2004 Constitution.

The nature of the various administrations has varied dramatically across the political spectrum from authoritarian⁷⁴ and constitutional monarchist⁷⁵ in the early and mid-20th Century, to socialist republic and fundamentalist Islamic regime in the late 20th Century and the current liberal democracy model under President Karzai. The ideologies of each of these political administrations, reflected in the Constitutions and the manner and extent to which they have sought to absorb *Shari'a* into the state system, have been key defining points in the development of Afghanistan's criminal legal system.⁷⁶

Aside from the pervasive influence of customary procedures, *Shari'a* courts retained unopposed jurisdiction over criminal matters in Afghanistan until the early 19th century when Dost Mohammad Khan (1826-1863) declared that serious crimes should be referred to him for deliberation.⁷⁷ Prior to then the *ulama* enjoyed unchecked authority over the provision of *Shari'a* education and the application of Islamic criminal law in the religious courts. Mohammad Khan's decree represented the first attempt by an Afghan ruling administration to impose a measure of centralised regulatory control over the application of *Shari'a* in criminal matters.

This process was furthered during the reign of Abdur Rahman Khan (1880-1901) often acknowledged as the founder of the Afghan state⁷⁸ who first created a formal state court system which included criminal courts, administered by chiefs of police (*kowtals*) and judges.⁷⁹ This process was augmented by the codification of positive law including the Penal Code 1896 that was essentially a codification of Islamic law and therefore represented a formal assimilation of the *Shari'a* into state criminal bureaucracy. The Code, however, was not an unadulterated reproduction of *Shari'a* norms. It was a modified version of *Shari'a*, accompanied by state imposed checks and balances to ensure regulatory control by the ruler. The more severe Islamic *hudud* punishments such as the amputation of a hand for theft and stoning for adultery were moderated by the Code, a legacy which persisted until the Taliban period.⁸⁰ Furthermore, the Amir assumed exclusive authority over offences against the state and criminal cases punishable by

⁷⁴ Arjomand, S.A. 'Constitutional Developments in Afghanistan: A Comparative and Historical Perspective,' (2004-2005) 53(4) *Drake Law Review*, 943-962, p.944

⁷⁵ Lau, note 72, p.29

⁷⁶ Wardak, note 36, p.319

⁷⁷ Vafai, G. H., *Afghanistan. A Country Law Study*, Library of Congress (1988), p.11

⁷⁸ Etling, note 42, p.6

⁷⁹ Vafai, note 77, p.11-12

⁸⁰ Etling, note 42, p.6

death.⁸¹ In addition, the scope of traditional Islamic retributive punishments were extended from the offender and their immediate family to whole communities by the imposition of compulsory fines on villages within a 10-mile radius of a crime.⁸²

Abdur Rahman's reforms led to the creation of the first formal criminal justice system in Afghanistan, which was augmented by designated courts and codified law. The establishment of an authoritarian state justice system, legitimised by reliance on *Shari'a*, was used as a vehicle to suppress any threats of insurgency among tribal factions, thereby sustaining his authority. To that extent Abdur Rahman recognised the importance of Islam and *Shari'a* as a unifying tool to control tribal insurgency. The result was the absorption of *Shari'a* into the state system but in an adapted form which differed from its traditional application in the religious Courts and which sought to enhance the authority of the ruler and the state. A more problematic consequence of the reforms was that the drive towards reliance on state law infringed the interpretative powers of the *ulama*.⁸³ The previous understanding between Afghan rulers and the *ulama* had been that rulers could issue decrees and make laws for the good of the state and the *ulama* would interpret them through *jirgas* or *shuras*. Abdur Rahman upset the balance of power between rulers and *ulama* by attempting to establish a centralised system based on *Shari'a* which challenged the authority of informal institutions and the *ulama*.⁸⁴ Although he ultimately allowed the informal system to continue to function alongside the state system in recognition of its continued legitimacy amongst the population, his attempts at centralising the legal system set in motion a collision course between the state, religious and tribal justice systems that has continued to characterise Afghanistan's criminal justice system to this day, each having different procedures, rules and adherents as well as varying levels of legitimacy.⁸⁵

The moderation of the influence of the *ulama* continued under King Ammanullah who reigned between 1919 and 1929. Encouraged by the successful reconstruction programme conducted by Kamal Atatürk in Turkey aimed at the creation of a secular state, Ammanullah embarked on an ambitious agenda of modernisation facilitated by legal

⁸¹ *ibid*, p.7; Vafai, note 77, p.24

⁸² *ibid*

⁸³ Etling, note 42, p.6

⁸⁴ Suhrke, A. (2009) 'Negotiating justice sector reform in Afghanistan,' *Crime Law and Social Change* (2009), 51, 211-230, p. 216

⁸⁵ Lau, note 72, p.7

reform in an effort to promote the establishment of a democratic parliamentary monarchy.⁸⁶ Afghanistan's first Constitution promulgated in 1923 gave official recognition to two sources of law, Islamic and statutory, thus marginalizing customary practices. A campaign of codification undertaken with the assistance of French and Turkish advisers led to new secular codes for commercial, civil and criminal law and the establishment of corresponding courts.⁸⁷ A Penal Code enacted in 1924-25 was derived from a systematic collection of Hanafi *fiqh* and represented a codification of Hanafi interpretations of Islamic law.⁸⁸ Comprising 308 articles it categorised offences according to the penalties they attracted along traditional *hudud*, *tazir* and *quisas* lines and fixed prescribed penalties for each class of criminal offence.⁸⁹ A statutory age of criminal responsibility of 15 was introduced and the use of force to extract confession evidence was prohibited. In addition, provision was made for rehabilitative penalties and the commutation of sentences.⁹⁰ While it was based on Islamic law, it was influenced by the French Penal Code⁹¹ resulting in a less authoritarian approach to criminal justice and punishment than that exacted by traditional Islamic justice but one nevertheless with inquisitorial characteristics.

Ammanullah's aim was to effect state control over criminal jurisprudence. The preamble to the Penal Code confirmed that all crimes fell within the jurisdiction of the state.⁹² The state would also assume control for legal education, an area previously under the exclusive management of the *ulama*. The consequent undermining of the authority of the *ulama* alienated influential religious leaders to the extent that they regarded the centralising reform agenda and codification process as un-Islamic. This resulted in a critical loss of religious and ethnic-tribal legitimacy leading to the mobilisation of anti-governmental factions who orchestrated Ammanullah's abdication in 1929.

Perhaps unsurprisingly, Ammanullah's successor, Nadir Khan, repealed all of his predecessor's secular legislation, including the Penal Code in 1929 and ordained that *Shari'a* should form the basis of criminal law.⁹³ The overriding authority of *Shari'a* was embedded in Nadir Khan's 1931 Constitution which decreed that 'the court of *Shariat*

⁸⁶ Vafai, note 77, p.5; Vogler, note 37, p.116

⁸⁷ Lau, note 72, p.28

⁸⁸ Etling, note 42, p.7

⁸⁹ *ibid*; Vafai, note 77, p.25.

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² Arjomand, note 74, p.947

⁹³ *ibid*, p.950

decides cases according to the Holy Hanafite creed.’⁹⁴ Islamic law was once again reinstated as the primary source of criminal jurisprudence by the Afghan state and Hanafi *fiqh* was applied by judges in all criminal cases until a period of renewed constitutional and judicial reform the 1960’s and 1970’s which resulted in an increased secularisation of the criminal justice system.⁹⁵

The 1964 Constitution, Afghanistan’s third, sought to actively integrate secular and religious principles into the state justice system. It defined ‘law’ as ‘those rules that are approved and passed by the government and the King,’⁹⁶ thereby confirming statutory law as the primary source of the justice system. However, it also allowed for the residual application of *Shari’a* in the absence of any statutory law and prohibited the enactment of any law ‘repugnant to the basic principles of Islam.’⁹⁷ This repugnancy principle provided the *ulama* with ultimate legislative authority. No law could be passed without their approval, with the net result, according to Bassiouni, that ‘the government defines the *qanun* [statute]’ but the *ulama* ‘interpret and control the *fiqh* [jurisprudence].’⁹⁸

The 1964 Constitution also provided that the judiciary would, for the first time, be an independent state body and new positive law re-organised the formal court system and criminal procedure.⁹⁹ The office of the Attorney General was created to investigate crimes¹⁰⁰ and the Supreme Court established to administer the organisation of lower courts and the supervision of the judiciary.¹⁰¹ Defendants were afforded the right to defence counsel¹⁰² and a Bar Association was founded.¹⁰³ A comprehensive criminal procedure code was passed in 1965, its provisions largely remaining in place until 2003. In addition, a Law on the Judicial Authority and Organisation of the Courts, enacted in

⁹⁴ 1931 Constitution, article 88

⁹⁵ Etling, note 42, p. 9

⁹⁶ 1964 Constitution, article 69

⁹⁷ 1964 Constitution, article 64, later replicated in the 1977 Constitution (article 99): the courts could apply the basic principles of Hanafi jurisprudence if no provision existed in the Constitution or statutory laws

⁹⁸ Bassiouni et al, *An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan* (2007) available at <http://www.rolafghanistan.esteri.it>

⁹⁹ 1964 Constitution, article 97

¹⁰⁰ article 103

¹⁰¹ article 105. The Supreme Court was established on 15 October 1967

¹⁰² article 26

¹⁰³ In 1965; Arjomand, note 74, p.952

1967,¹⁰⁴ created a bipartite national court system comprised of general and special courts.¹⁰⁵

The modernisation of Afghanistan's state criminal justice system continued apace in the 1970's. The Guiding Rules on Criminal Affairs issued in 1971 provided statutory guidelines for sentencing and a new Penal Code, still in force today, was passed in 1976 under President Daoud.¹⁰⁶ Both closely followed legal principles of Hanafi *fiqh* so that Islamic principles of criminal jurisprudence were absorbed into state law.¹⁰⁷ As had been the case with Ammanullah, however, Daoud's modernising agenda provoked resistance from conservative power-holders. According to Saikal, Daoud 'failed to codify his programme in a way acceptable to the predominantly traditional and Islamic society,'¹⁰⁸ resulting eventually in a *coup d'état* in 1978 which ousted him from power.

The removal of Daoud resulted in a further period of criminal justice reform. The Marxist People's Democratic Party of Afghanistan (PDPA) established a justice system designed to support an authoritarian socialist state capable to performing purges against suspected dissidents. Amnesty International reported widespread violations of human rights in 1978¹⁰⁹ and by autumn 1979 it is thought that at least 10,000 people had been executed and between 30,000 and 50,000 imprisoned.¹¹⁰ Although the pre-existing criminal justice system was preserved it was supported by a newly established military tribunal created to 'try persons who have committed offences against the Revolution.'¹¹¹ Later socialist regimes in power during Soviet rule from 1979 to 1988 retained this legal model in order to suppress opposition, supporting it with a brutal secret police force, the Khedamat-e-Etelea'at-e Dawlati (KHAD).¹¹²

As part of the process of trying to create a centralised socialist state this period also witnessed an intensification of secularisation policies at the cost of Islamic jurisprudential

¹⁰⁴ Law on the Judicial Authority and Organisation of the Courts, 7 October 1967

¹⁰⁵ Lau, note 72, p.29

¹⁰⁶ The Penal Code is reviewed in Section 3.4.2 of this chapter

¹⁰⁷ Etling, note 42, p.11

¹⁰⁸ Saikal, A. *Modern Afghanistan: A History of Struggle and Survival*, London: IB Tauris (2005), p.80

¹⁰⁹ Amnesty International, 'Violations of Human Rights and Fundamental Freedoms in the Democratic Republic of Afghanistan' (1979)

¹¹⁰ Lau, note 72, p.31

¹¹¹ The Revolutionary Council's Decree No. 3 (May 1978)

¹¹² Mohammad, F. And Conway, P. 'Justice and law enforcement in Afghanistan under the Taliban,' *Policing-Bradford* (2003) 26(1),162-167, p.163

influences. The 1980 Interim Constitution of Afghanistan declined to recognise *Shari'a* as a source of law and Islam as the official religion of the state. Article 5 provided only for the 'respect, observance and preservation' of Islam. The imposition of socialist ideology and the consequent attempt to disenfranchise religious leaders and undermine the influence of Islamic legal traditions provoked widespread discontent and fuelled support for the *mujahedeen* who, following the subsequent collapse of the last Marxist government in 1992, embarked on a policy of 're-Islamization' of the country's legal system which reflected a reaction to the process of secularisation that had been imposed during the socialist and Soviet eras. This resulted in a reversion to orthodox interpretations of *Shari'a*. The reform process, however, was piecemeal and lacked comprehensive Constitutional or legislative guidance, making for confusion over the precise nature of applicable law. Adding to the confusion, a Constitution was drafted but never promulgated and previous Constitutions were not officially repealed. There was, nevertheless, uniform agreement amongst the various *mujahedeen* factions that the new legal order should be based on Islamic principles alone.¹¹³

The Islamization of Afghanistan's justice system took on a more radical progression during the theocratic rule of the Taliban from 1996 to 2001 who adopted a fundamentalist approach towards Islamic justice ruthlessly enforced by a religious police force under the aegis of a 'Ministry of Virtue.'¹¹⁴ The Taliban repealed all laws passed during the communist regimes and adopted the pre-1978 criminal justice administration system, adapting it to promote their radical interpretation of Islamic justice. The judiciary was composed of *Shari'a* courts established at district, provincial and central levels, to which prosecutor's offices were attached. Complainants in criminal cases could opt for the matter to be resolved by either the *jirga* or the court system which administered *Shari'a* law. If the *jirga* system was chosen, an executive officer would appoint members to the *jirga* of appropriate ability to facilitate a resolution of the dispute. According to Mohammad 'most of the criminal disputes were solved by the legal system.'¹¹⁵ The investigative phase would be conducted by representatives from the police and the prosecutor's office and by a state official who would submit their concluding report to the chief executive. The matter would then be referred to a judge would examine the evidence obtained during the preliminary

¹¹³ Wardak, note 36, p.325. Article 5 of the draft 1993 Constitution stipulated that 'the [Shariat] of Islam is the single source of legislation in the country.'

¹¹⁴ Mohammad et al, note 112, p.163

¹¹⁵ *ibid*, p.166

investigation and decide whether the matter would proceed to trial. If he established that it should, it would be referred to the High Court where the case would be decided. The accused was entitled to representation. If found guilty the matter would be referred to the Supreme Court for consideration and on a further finding of guilt to the Head of the State under the Taliban for final consideration. Verdicts were made public and punishments were carried out in adherence to *Shari'a* tradition.¹¹⁶

The Taliban's orthodox interpretation of Islam was generally viewed by the western world as archaic and oppressive. For some observers, however, the criminal justice approach of the Taliban had value and merit in a country that had been destabilised by foreign intrusion and years of civil war. Misdaq has argued that some of the Taliban's justice achievements were 'salutary',¹¹⁷ on the basis that although the punishments exacted under the system were harsh and relied on more fundamentalist interpretations of *Shari'a*, at least the system that existed was largely devoid of the delays, nepotism and corruption that historically characterised the formal state justice system under previous regimes. Perhaps also the Taliban can be credited with replacing the chaos and inconsistency of the justice system in the *mujahedeen* era with the establishment of a uniform and centralised state criminal justice system alongside the *jirga*, a goal that has so often eluded those in power in the Afghan state.

By 2001, then, Afghanistan's criminal justice system had undergone several transformations in line with political upheavals of the 20th and 21st centuries that had seen it lurch from authoritarian and constitutional monarchy to communist state and from fundamentalist Islamic theocracy to democratic republic. Since the creation of the state justice system in 1924, Afghanistan's diverse administrations had remodelled the state criminal justice system in efforts to supplement their ideologies and impose some form of centralised and regulatory control. This system was created and developed by the processes of Constitutional reform and the codification of positive law. Both procedures led to the assimilation of *Shari'a* into the formal criminal justice system. Islamic jurisprudence was secularised through its translation into statutory law by way of the codification of Hanafi *fiqh* in both the Penal Codes of 1924-25 and 1976.¹¹⁸ The Constitutional absorption

¹¹⁶ *ibid*, p.165

¹¹⁷ Misdaq, N. (2006) 'Afghanistan. Political Frailty and Foreign Interference,' Routledge, p.193

¹¹⁸ Etling, note 42, p.11

of *Shari'a* fluctuated with regime change. The 1923 Constitution officially recognised *Shari'a* as a source of law. The 'repugnance clauses' in the 1964 and 1977 Constitutions allowed only for residual use of Islamic jurisprudence after consideration of state law. Later, the 1980 Constitution reduced the role of *Shari'a* by allowing merely for the 'respect, observance and preservation of Islam'. The *mujahedeen* and Taliban regimes subsequently changed the jurisdictional picture by reinstating *Shari'a* as the primary source of criminal law.

By and large the attempts at secularisation acknowledged Islamic law in order to appeal to Afghanistan's predominantly Muslim population. However, with the exception of the *mujahedeen* and Taliban phases, Islamic jurisprudence was given secondary status to state law in an effort to enhance centralised control. According to Jones-Pauly this hierarchization of these two legal traditions served to put them on a confrontational 'collision course' contributing to the instability that has characterised Afghanistan's justice system.¹¹⁹ As Weinbaum noted in 1980, 'the two legal traditions [Islam and state law] and the elites they foster are frequently competitive and incongruent.'¹²⁰

The shifting hierarchization of state and Islamic legal traditions during the historical development of the state justice system reflects their uncomfortable co-existence and the difficulties that the various architects of the system have had in integrating them. There are conflicting differences in the approaches of *Shari'a* and statutory interpretations of criminal jurisprudence which have undermined attempts to absorb Islamic jurisprudence into secular law at the heart of which is the contrast between the interpretative quality of the application of Hanafi *fiqh* and the prescriptive nature of codified law.

Because of the difficulties of harmonising these two approaches, what emerged was a bifurcated state system where both Islamic and secular law were applied in most courts.¹²¹ In 1980 Weinbaum observed that 'there are two court systems, one handling criminal and civil cases arising under *Shari'a* and the other largely restricted to statutory law.'¹²² This dichotomy was reflected in and perpetuated by the educational training of the legal professionals who worked in the justice system. Secular and religious law faculties were

¹¹⁹ Jones-Pauly et al, note 18, p. 852

¹²⁰ Weinbaum, note 157, chapter 2, p.39

¹²¹ Suhrke, note 84, p. 218

¹²² Weinbaum, note 120, p.41

established at Kabul University in the early 1940's. Until then the sole educational prerequisite for entry to the administration of justice was a qualification in *Shari'a*.¹²³ The two faculties that were created became independent bodies teaching their own distinctive courses. Students studying Islamic jurisprudence would have previously undergone twelve years of training in a *madrassa*. Those undergoing tertiary secular legal training were instructed using mainly French teaching models.¹²⁴ The legal educators taught separate secular and religious courses and there was very little inter-departmental communication between staff and students, fostering the formation of two separate legal communities.

These divisions continued once students completed their education and began working in the professional sector, with *Shari'a*-trained graduates applying Islamic law, and secularly trained graduates applying statutory law. According to Weinbaum the *Shari'a*-educated judges remained mostly ignorant of applicable statutory law and were 'resentful of the appearance of an alien system of laws and an alternate judiciary.'¹²⁵ Secularly-trained judges, on the other hand, sought to apply codified law, yet this still required them to be appreciative of Islamic jurisprudence because of the allowance for its residual application and in this regard they felt inadequately trained.¹²⁶ The competition between state and Islamic law ultimately weakened the application of secular codified law and educational divisions reduced the number of secularly-trained legal professionals, limiting the capacity of the state criminal justice system. In 1980 the legal community in its entirety comprised no more than 1,200 individuals, including 715 judges, 170 public prosecutors, 100 lawyers serving departments at the Ministry of Justice and 50 legal educators. Only one-fifth of Afghanistan's jurists were applying state laws although many were lacking appropriate training and resources to comprehend and apply them.¹²⁷ In addition, there were just 162 defence lawyers, most of whom were based in Kabul,¹²⁸ 8 provinces had no practising defence lawyers at all and a lack of qualified personnel and insufficient resources resulted in approximately 100 of the country's 220 district courts lacking a prosecutor.¹²⁹

¹²³ *ibid*, p.40

¹²⁴ *ibid*, p.43

¹²⁵ *ibid*, p.41

¹²⁶ There was improved secular judicial training in the 1960's; Thier, J.A. (2004) *Re-establishing the Judicial System in Afghanistan*, CDDRL Working Paper, No.19, 01.09.2004, available at <http://cddrl.Stanford.edu>, p.6

¹²⁷ *ibid*

¹²⁸ Weinbaum, note 120, p.41

¹²⁹ *ibid*, p.40

The state system lacked the resources to have any reach beyond Kabul and urban areas to the provinces and was regarded as a less meaningful process for resolving criminal justice issues than those provided by customary approaches and *Shari'a*. Aside from the practice of *baad*, which violated *Shari'a*, there was little cause for competition between these two legal traditions and in reality customary practices operated in tribal areas without any opposition from either *Shari'a* or the state system. In remote tribal areas the state would rarely intervene.¹³⁰ When it did, rather than insisting on the application of state-created procedures, it would often acknowledge the significance of localised legal norms. A survey of 104 criminal cases in Pashtun tribal regions in the early 1980's revealed that 84 were resolved by customary processes. Of the remaining 20, in which state agencies and mechanisms were involved, the majority were decided in accordance with *pashtunwali* legal norms.¹³¹ While this might suggest that the three traditions could co-exist in harmony, it also demonstrates the historical inadequacies of the state system and its deference to customary and Islamic processes beyond urban centres.

By 1993 the situation was unchanged. Amin observed that 'in most areas the State law of Afghanistan still remains unenforceable. What is in force is either the religious law in the form of traditional Islamic law or the customary and tribal practices.'¹³² Amin also noted that 'for most ordinary villagers and tribesmen, who form the majority of the population, Islamic law and tribal law remain more significant than State legislation.'¹³³ By this stage Afghanistan was locked in a period of civil war which, along with later Taliban rule, brought education and the development of the state secular system largely to a standstill. The result was that at the time the Bonn Agreement was brokered in 2001 criminal justice was dispensed in different ways in Afghanistan in accordance with plural customary, Islamic and state legal traditions and the state criminal justice system itself remained bifurcated, with both secular and Islamic law applied in the courts, and less meaningful to the majority of the population than Afghanistan's other two legal traditions.

¹³⁰ Rzehak, note 33, p.6

¹³¹ *ibid*, p.17

¹³² Amin, S.H. *Law, reform and revolution in Afghanistan: implications for Central Asia and the Islamic world*, Glasgow Royston Publishers 3rd ed. (1993), p.80

¹³³ *ibid*, p.66

Section 3.4 Criminal Justice Reform 2001-2011

3.4.1 Establishing the criminal law framework

In addition to clarifying the manner in which the reform of the criminal justice system should proceed, the Bonn Agreement also provided essential guidance on the composition of Afghanistan's immediate criminal law framework. In this respect the Bonn delegates took a similar approach to that adopted by the UN in East Timor and Kosovo and chose to rely on existing legislation. Consequently, Bonn established that until the adoption of a new Constitution the interim legal system should be that established by the 1964 Constitution together with the domestic laws and regulations enacted since then provided they did not conflict with the old Constitution or the terms of the Agreement.¹³⁴ It was necessary, therefore, to identify all domestic laws and regulations in existence since 1964.

Finding these laws proved problematic as no ready compilation of existing laws and regulations existed, or had ever been compiled. Some Codes had been published in the monthly Official Gazette (*Rasmi Jareda*) but there was no complete set of copies of the Gazette upon which to rely.¹³⁵ The previous 23 years of civil war and the dependence by the Taliban exclusively on *Shari'a* had left legislative record-keeping in disarray. The Taliban had burned legal texts at the Kabul Law Faculty¹³⁶ and the Gazettes at the Ministry of Justice had largely been destroyed. In the early stages of reform post-Bonn, therefore, there was significant confusion over the nature of the country's applicable criminal law.

To assist matters, the Interim Authority issued a decree on 5 February 2002 repealing 'all decrees, laws, edicts, regulations and mandates, which are inconsistent with the 1964 Constitution and the Bonn Agreement'¹³⁷ with the intent of purging the justice system of legislative material contrary to Afghanistan's political future envisaged to be a liberal, constitutional democracy supported by an effective justice system which would foster rule of law, social justice and international standards of human rights.¹³⁸ It also handed the task of ascertaining the nature of existing legislative instruments to the Ministry of Justice and

¹³⁴ Bonn Agreement, Ch. II. See Appendix 1 for a discussion of constitutional and legal institutional reform under Bonn

¹³⁵ CRAFT, 'Filling the Vacuum: Prerequisites to Security in Afghanistan' (March 2002) available at <http://www.abnet.org/aba-asia/docs/afghanistan.pdf>, p.19

¹³⁶ *ibid*

¹³⁷ Legislative Decree of Interim Administration Regarding the Repeal of Decrees and Legislative Documents Prior to First of Jadi 1380, 5 February 2002

¹³⁸ Suhrke, note 42, chapter 2, p.1298

on its authority IDLO began collating all relevant legal materials. This established that a confusing assortment of over 2,400 separate legal texts in Dari and Pashto and 100 in English has been passed between 1921 and 2001.¹³⁹ Such was the enormity of the task of accessing these laws that IDLO did not complete a digital compilation of them until October 2003 and by March 2004 had still not been able to index or indeed distribute them to legal actors.¹⁴⁰ USIP, ABA and International Resources Group had, however, collected authentic versions of some key legal codes in force.¹⁴¹ By examining these, a clearer picture of relevant applicable law began to emerge.

3.4.2 Applicable state substantive criminal law

Separate reports prepared by the International Commission of Jurists (ICJ)¹⁴² and the Consortium for Response to the Afghanistan Transition (CRAFT)¹⁴³ in 2002 both confirmed that substantive criminal law was governed by the Penal Code 1976.¹⁴⁴ Consisting of 523 articles, it incorporates both Islamic and European approaches to criminal justice and still remains the primary source of formal substantive criminal law today.¹⁴⁵ While it confirms that state law is the primary source of law, it also acknowledges Islamic law as an additional legal source.¹⁴⁶ It allows for statutory regulation of *tazir* offences attracting discretionary punishments, but stipulates that persons committing *hudud*, *quesas* or *diat* offences, which carry fixed penalties, should 'be punished according to the principles of the Hanafi School of Islam.'¹⁴⁷ In this way *Shari'a* law of Hanafi jurisprudence is built in to positive state law as one of the key sources for defining crime and punishment. The result is the creation of a mixed penal system with some offences attracting non-discretionary Islamic punishments and others attracting discretionary penalties based on western approaches to criminal justice.¹⁴⁸

¹³⁹ IDLO database available at http://www.idli.org/afghanistan_project.htm

¹⁴⁰ USIP, note 125, chapter 1, p.9

¹⁴¹ *ibid*

¹⁴² Lau, note 72, p.2

¹⁴³ CRAFT, note 135, p.24

¹⁴⁴ Penal Code 1976 Official Gazette No. 347, published 06/10/1976 (1355/07/15 A.P.) available at <http://www.afghanistantranslation.com>

¹⁴⁵ Benard, A., Berg, J.T., Joseloff, B.G., Stephens, A. and Sugerman, E. *An Introduction to the Law of Afghanistan*, (2009) Stanford Law School available at www.law.stanford.edu, p.160-162

¹⁴⁶ article 2

¹⁴⁷ article 1

¹⁴⁸ Vafai, note 77, p.26

The sentencing guidelines for the *hudud* offences of adultery,¹⁴⁹ defamation,¹⁵⁰ robbery¹⁵¹ and extortion¹⁵² all call for primary consideration as to whether the right conditions exist for the matter to be tried as a '*had*' offence, determined by the availability of confession evidence or the testimony of an appropriate number of witnesses prescribed for each offence. If the right conditions do not exist, sentencing guidelines prescribed by the Code can be applied in the alternative.

Qesas offences attract retributive penalties including corporal punishment for intentional murder, although there are optional alternative sentences of compensation by transferring money or property (*diat* and *irsy*) which allow some element of judicial discretion. In implementing *quesas* penalties, matters including equality between individuals, similarity and proportionality between the crime and the offence are considered under the Code.¹⁵³

The remaining discretionary *tazir* offences are defined in the Code which also details the punishments they attract. These are similar to those found in western jurisdictions.¹⁵⁴ Felonies are punishable by life sentence, long-term imprisonment of 5-15 years or execution,¹⁵⁵ 'misdemeanours' carry penalties of 3 months to 5 years imprisonment or a fine of more than 3,000 Afghanis¹⁵⁶ and a minor offence, defined as an 'obscenity', entails a punishment of imprisonment for any period from 24 hours to 3 months or a fine not exceeding 3,000 Afghanis.¹⁵⁷ The various punishments provided for in the Code range from cash penalties to periods of imprisonment, varying from a minimum of 24 hours¹⁵⁸ to a maximum of 20 years,¹⁵⁹ and execution by hanging.¹⁶⁰ There are allowances for mitigation,¹⁶¹ the suspension of sentences for up to 3 years¹⁶² and differentiation between actual and attempted commission of offences.¹⁶³

¹⁴⁹ article 426

¹⁵⁰ article 436

¹⁵¹ article 447

¹⁵² article 454

¹⁵³ Gholami, H. *Basics of Afghan Law and Criminal Justice* (2007) available at <http://www.auswaertigesamt.de/diplo/de/Aussenpolitik/RegionaleSchwerpunkte/AfghanistanZentralasien/Downloads/Polizei-Legal-Manual.pdf>, p.108

¹⁵⁴ Lau, note 72, p.2

¹⁵⁵ article 24

¹⁵⁶ article 25

¹⁵⁷ article 26

¹⁵⁸ article 102

¹⁵⁹ article 99(2)

¹⁶⁰ article 98

¹⁶¹ article 41 - 'good intentions' and 'unlawful provocation of the criminal by the victim'

¹⁶² article 162

¹⁶³ article 30

The Code presents as essentially a codification of Hanafi *fiqh*.¹⁶⁴ There are, however, also elements within it that are similar to European substantive criminal law, such as its requirements for establishing criminal responsibility and its inclusion of the principles of non-retroactivity and the legality of crimes. For a crime to be committed, therefore, it must be defined as an offence by law.¹⁶⁵ Convictions depend on the prosecution proving both the ‘material’ elements of an act or omission of an act leading to the offence¹⁶⁶ and the ‘moral’ element of intent.¹⁶⁷ In addition, a defendant can only be punished in accordance with the provisions of the law in force prior to the commitment of the crime,¹⁶⁸ although allowance is made for the application of new laws that might benefit the accused.¹⁶⁹ This is important for the establishment of sustainable rule of law as it ensures against state intrusion in criminal justice processes by the imposition of retroactive laws. It is recognised in the *Qu’ran*¹⁷⁰ and enshrined in the ICCPR,¹⁷¹ to which Afghanistan is a signatory. It also compliments similar provisions in the 1964 and the later 2004 Constitutions.¹⁷²

3.4.3 Applicable state criminal procedural law

Criminal procedure in 2001 was being applied by public prosecutors with reference to the Criminal Procedure Law 1965.¹⁷³ This comprised 500 articles and largely replicated the content of the French Procedural Code.¹⁷⁴ The police and the public prosecutor (*Saranwal*) were responsible for the detection of crimes, the apprehension of offenders and the gathering of evidence for investigation.¹⁷⁵ They were empowered to issue arrest warrants for felonies and misdemeanours on the basis that ‘there are sufficient grounds to believe’ the suspect is the offender.¹⁷⁶ Suspects could be detained for 24 hours by the police¹⁷⁷

¹⁶⁴ Kamali, M.H. *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary*, Leiden: Brill (1985), p.42

¹⁶⁵ article 37

¹⁶⁶ article 27 – similar to actus reus

¹⁶⁷ article 34 – similar to mens rea

¹⁶⁸ article 3

¹⁶⁹ article 21

¹⁷⁰ Max Planck Manual on Fair Trial Standards (2006), available at http://www.mpil.de/shared/data/pdf/mpil_fair_trial_3rd_edition_engl.pdf, p.14 and 15

¹⁷¹ article 15, ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>

¹⁷² 1964 Constitution (article 26), 1976 Constitution (article 30), 1987 Constitution (article 41), 1990 Constitution (article 41), 2004 Constitution (article 27)

¹⁷³ Official Gazette No. 26, 1965/05/26 (1344/03/05 A.P.)

¹⁷⁴ Vafai, note 77, p.35

¹⁷⁵ articles 16, 45

¹⁷⁶ article 26

¹⁷⁷ article 28

although this could be extended by the public prosecutor for up to 7 days¹⁷⁸ and could be increased further on application to the judge and following a hearing for up to three months.¹⁷⁹ On completion of investigations the *Saranwal* would decide whether to prosecute. Prescribed timescales were provided for the conclusion of investigations¹⁸⁰ and the prosecution of cases following the completion of investigations.¹⁸¹ If the decision was taken to prosecute the *Saranwal* would file a criminal suit.¹⁸² Trials were juryless and would begin with the charges being read out to the accused. The victim, prosecutor and any plaintiff in a corresponding civil action would then forward their cases against the defendant who then plead. On pleading his or her innocence the prosecution would call witnesses who may be examined and cross-examined by the prosecutor, the victim, plaintiff and the accused.¹⁸³ The same process would then follow with the witnesses for the defence.¹⁸⁴ The defendant was not compelled to give evidence at trial.¹⁸⁵ Once all the evidence in the case had been presented the parties, including the prosecutor, witnesses, victim and the accused were entitled to 'enter into a conversation with one another,' whereupon if no admission was made by the accused the judge passed judgement.¹⁸⁶

The 1965 Criminal Procedure Law was amended by legislation passed in 1967, 1974, 1979, 1981 and 1991.¹⁸⁷ These amendments reflected the upheavals that Afghanistan underwent from the 1960's to the 1990's that resulted in far-reaching political changes from constitutional monarchism to experimentation with communism and later Soviet occupation. In spite of the identification of relevant legislation, the multitude of amended law added to a sense of confusion in 2001 as to the exact nature of applicable law and the precise manner in which it should be applied and enforced. While the Bonn Agreement stipulated that only laws consistent with it and with international legal obligations could be recognised, some laws, particularly those from the Taliban era, were incompatible with these requirements and other laws, while meeting them, were inconsistent with each other.

¹⁷⁸ article 29

¹⁷⁹ article 86

¹⁸⁰ article 88

¹⁸¹ article 122

¹⁸² article 122

¹⁸³ article 221

¹⁸⁴ article 222

¹⁸⁵ article 224

¹⁸⁶ article 225

¹⁸⁷ Vafai, note 77, p.36

A deficiency in resources and record-keeping of judicial decisions and a lack of guidelines in relation to the interpretation of some areas of legislation added to uncertainties. The imposition of *hudud* penalties in article 1 of the 1976 Penal Code, for example, appeared to contradict article 4 of the Code which prohibited ‘any punishment which is discordant with human dignity,’ although neither the Code nor the 1964 Constitution¹⁸⁸ provided any definition for this concept.¹⁸⁹ They were also arguably incompatible with both the 1964 Constitution¹⁹⁰ and Afghanistan’s commitment to human rights conventions.

There was also confusion regarding the powers of the prosecutor to detain suspects. The 1965 Law empowered prosecutors to extend periods of detention for seven days following initial detention by the police for 72 hours, which the CRAFT report confirmed was the prevailing practice in 2002.¹⁹¹ However, neither the 1974 amended Law nor that of 1981 provided for a detention period of this duration.¹⁹²

3.4.4 Development, Reform, Training and Capacity Building

I have proposed earlier that local contextual issues that influence criminal justice in the country adopting a legal transplant will affect its reception. It is vital, therefore, to consider reform programmes and capacity building enterprises undertaken to reconstruct the justice sector in Afghanistan post-2001 as the progress of these efforts are likely to impact on the potential reception of the ICPC and the CNL.

While the 1965 Criminal Procedure Law and the 1976 Penal Code were established as the principle statutes clarifying immediate applicable criminal law and the state criminal justice system was functioning in 2001 and 2002, it was nevertheless not functioning in the manner contemplated by the 1964 Constitution. The offices of the Kabul public prosecutor reportedly employed 184 staff and in the six months between October 2001 and March 2002 42 of 75 criminal cases were submitted to Court.¹⁹³ The majority remained outstanding (310) and, according to one report, statutory criminal law was ‘not widely

¹⁸⁸ The 2004 Constitution also fails to provide any definition for ‘punishment discordant with human dignity’

¹⁸⁹ Gholami, note 153, p.108

¹⁹⁰ article 26, 1964 Constitution

¹⁹¹ CRAFT, note 135, p.24

¹⁹² Lau, note 72, p.23

¹⁹³ CRAFT, note 135, p.24-25

applied or enforced',¹⁹⁴ and judges did not 'seem to know much about the procedural laws.'¹⁹⁵ Soon after the intervention in 2001 it was clear, then, to international experts that urgent measures would be required to construct a sustainable state criminal justice system in Afghanistan.¹⁹⁶

An international donor conference was convened in Tokyo in January 2002 during which a number of countries formally volunteered responsibility for leading reform in several fundamental state sectors. Germany assumed leadership of training and equipping the Afghan police and Japan for disarmament, demobilisation and reintegration; the United States opted to lead reform of the Afghan armed forces; the United Kingdom was assigned 'lead nation' status in the field of counter-narcotics and Italy assumed responsibility for the justice sector. These roles would entail the co-ordination of external professional assistance, providing and generating donor financial assistance and liaising with Afghan officials on major reform efforts, which would include the drafting of new relevant legislation.¹⁹⁷

On assuming its role as lead nation for the justice sector Italy was aware of the urgent need for criminal law reform. This was evident from the conclusions of the ICJ report in 2002 and, later, an Amnesty International report, which had observed that 'many judges do not have a basic knowledge of the criminal code and the criminal procedure code that are in force.'¹⁹⁸ In response to the evident requirement for new legislation to construct a modern and sustainable state criminal justice system considerable progress was made with regard to improving and revising Afghanistan's criminal law framework between 2004 and 2006. On 4 January 2004 a new Constitution was ratified, confirming the structure of the state criminal court system and establishing a number of cornerstone principles and guidelines for the application of state criminal justice.¹⁹⁹ The Interim Criminal Procedure Code was passed in February 2004, a Juvenile Justice Code was introduced in March 2005, a Law on Prisons and Detention Centres was adopted in May 2005, a Police Law in

¹⁹⁴ Lau, note 72, p.21

¹⁹⁵ *ibid*, p.21

¹⁹⁶ Barfield, T.J. 'On Local Justice and Culture in Post-Taliban Afghanistan,' (2001-2002) *Connecticut Journal of International Law*, 17(3), 437-443, p.440

¹⁹⁷ See Appendix 3 for additional discussion on the Tokyo Conference and the UN lead nation policy

¹⁹⁸ Lau, note 72; Amnesty International, note 120, chapter 1

¹⁹⁹ See Appendix 3 for a discussion of Constitutional reform and the organisation of the criminal courts

September 2005 and the Counter Narcotics Law in December 2005.²⁰⁰ All were essentially 'externally-driven' and drafted with extensive input from international actors, principally from Italy, the UK and the UN.²⁰¹ In October 2005 a new Law Reform Working Group was established under the auspices of the Justice Sector Consultative Group (JSCG) to manage national and international efforts to initiate legislative reform.²⁰² Legislative progress in the area of criminal law reflected a period of extensive reform in which on average the Ministry of Justice (MOJ) passed more than 37 new laws a year.²⁰³

With regard to the development of government strategy on enhancing the justice framework, a 10-year reform programme was outlined in a paper entitled 'Justice for All' approved by the government in October 2005 and developed with substantial international donor assistance.²⁰⁴ This comprehensive needs assessment for the justice sector post-dated the ICPC, but pre-dated the CNL by 2 months and contained important guidance for the content of new legislation. New law, it stipulated, to include counter narcotics measures,²⁰⁵ should conform with both international standards of human rights and Islamic principles. In addition, it urged that means of engaging with the traditional justice system should be explored.²⁰⁶ It did, then, advocate some negotiation between Afghanistan's legal traditions. However, it fell short of insisting on any specific reference to customary justice procedures and mechanisms. Furthermore, it was fundamentally underpinned by a modernising agenda, evidenced by its assertion that future criminal justice legislation should be cognisant of 'legal frameworks of modern, market-based democracies.'²⁰⁷

The momentum of reform was continued at a conference in London in January 2006, a month after the CNL was passed by Presidential Decree. International donors pledged a further US\$10.5 billion towards Afghan reconstruction, and the Interim Afghanistan

²⁰⁰ The reasons for the development of the ICPC and the CNL and the processes which led to their development are examined in detail in Chapters 4 and 5

²⁰¹ Tondini, M., *Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan*, Routledge (2010) p.55-56. The Juvenile Code was prepared by a team co-ordinated by IJPO; the Penitentiary Code was drafted by IJPO and UNODC actors.

²⁰² UNAMA, note 154, chapter 2, p.3

²⁰³ Afghan Ministry of Justice available at <http://www.moj.gov.af/?lang=en&lang=en&p=events&nid=177>

²⁰⁴ Ministry of Justice (2005) *Justice for All*, available at <http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf>;

²⁰⁵ *ibid*, p.13

²⁰⁶ *ibid*, p.12

²⁰⁷ *ibid*, p.7

National Development Strategy (I-ANDS) with the Afghanistan Compact were unveiled.²⁰⁸ These built on the Justice for All recommendations and provided for agreement between the Afghan government and the international community over a number of time-framed benchmarks to be achieved. Amongst the Compact's rule of law component, which was made up of 4 benchmarks and mirrored those in I-ANDS, it stipulated that the country's criminal law framework should be 'put in place, distributed to all judicial and legislative institutions and made available to the public' by 2010.²⁰⁹ With regard to criminal justice reform the Compact affirmed a target of ensuring 'equal, fair and transparent access to justice for all based upon written codes with fair trials and enforceable verdicts.'²¹⁰ The codification of law was clearly regarded by state-building strategists as the appropriate means of continuing the reconstruction of Afghanistan's justice system.

The Compact also led to the establishment of the Joint Coordination and Monitoring Board (JCMB) designed to monitor progress in the efforts towards meeting the benchmark targets by 2010.²¹¹ A consultative group within the JCMB replaced the JSCG and took responsibility for coordinating reform programmes to meet the Afghan National Development Strategy (ANDS) benchmarks including those connected with governance, rule of law and human rights.²¹² Within this consultative group, a Rule of Law Working Group was formed consisting of a number of technical working groups, which include a Criminal Law Reform Committee to counsel on continued criminal law reform and an advisory committee for counter narcotics.²¹³

Between 2002 and 2007 some progress was made with regard to improving criminal justice infrastructure. With assistance mainly from USAID, UNDP and the United Nations Office for Project Services (UNOPS) 45 justice buildings had been rebuilt, including 23 provincial courthouses, 8 prosecutor's offices and 14 district court buildings.²¹⁴ Significant justice training programmes were also undertaken during this period, conducted and financed by international donors (mainly financed by Italy and contracted out training work

²⁰⁸ The Afghanistan Compact, London Conference on Afghanistan 31.01.2006-01.02.2006 (S/2006/90, annex), available at <http://www.unama-afg.org/news/londonConf/docs/06jan30-AfghanistanCompact-Final.pdf>

²⁰⁹ UNDP, note 15, p. 81

²¹⁰ Compact, note 208, p.3

²¹¹ JCMB Terms of Reference available at http://www.diplomatic.gouv.fr/en/IMG/pdf/JCMB_TOR-English.pdf

²¹² UNDP, note 15, p. 81

²¹³ UNAMA, note 202, p.4. New Criminal Procedure and Counter Narcotics Laws are being developed although neither have yet to be passed; interview, adviser at ADIDU, UK FCO, 26.04.2011

²¹⁴ UNAMA, note 202, p.8

to bodies such as IDLO, the International Institute of Higher Studies in Criminal Sciences (ISISC), the United Nations Office on Drugs and Crime (UNODC) and UNDP). Between 2003 and 2005 the UNDP carried out training programmes involving 120 Judges and 130 law graduates due to be employed within justice institutions.²¹⁵ Between July 2003 and December 2004 the IDLO delivered a skills-orientated training programme to 500 Afghan judges, MOJ officials and prosecutors;²¹⁶ and between 2005 and 2006 it provided training to a further 361 judges and 330 prosecutors.²¹⁷ It also assisted in the training of Afghan lawyers undertaken by the Legal Aid Organisation of Afghanistan (LAOA).²¹⁸ The ISISC, in addition, provided in-depth training on criminal law to 450 Judges and prosecutors in 2003 and 2004.²¹⁹ Furthermore, following the introduction of the ICPC, it provided training on the new procedures to 100 Judges, lawyers and judicial police officers, with the intention that they would later disseminate their knowledge and train their colleagues.²²⁰ It also implemented a Provincial Justice Initiative in 2004 and 2005 aimed at improving criminal justice administration and capacity in each of Afghanistan's provinces, 11 of which had received training on criminal procedure under the scheme by 2007.²²¹

Police reform started from a very low base in 2002. When Germany assumed lead nation responsibility for the police sector, Afghanistan's police force had been, according to one report 'virtually non-existent.'²²² According to another report, it was 'an untrained force manned primarily by factional commanders and their militias, who had little or no equipment or infrastructure, [and] who were unpaid or under-paid.'²²³ The Afghan National Police force (ANP) was created by Presidential decree in April 2003 and while the initial German-led reform programme provided good quality training for a limited number of middle and senior-ranking officers, it was later criticised for failing to 'either reform the institutional context into which they were being inserted or to improve the quality of the mass of ordinary police.'²²⁴ The US increased its involvement in police reform from 2004

²¹⁵ UNDP, *Rebuilding the Justice Sector of Afghanistan*, implemented between 2003 and 2005; see <http://www.undp.org.af>

²¹⁶ UNAMA, note 202, p.15

²¹⁷ Tondini, note 201, p.79

²¹⁸ *ibid*

²¹⁹ *ibid*, p.57

²²⁰ Details at <http://www.ISISC.org/PagesDocument.asp?IDoc=302&SubHome=5036064&Menu=2>

²²¹ UNAMA, note 202, p.15

²²² UNDP, note 15, p. 82

²²³ Wilder, A. *Cops or Robbers? The Struggle to Reform the Afghan National Police*, AREU Issues paper Series, (July 2007) available at www.areu.org.af, p.4

²²⁴ Carter et al, note 30, p. 30

and the European Union (EU) later from 2007.²²⁵ At the 2010 London Conference agreement was reached to increase ANP numbers to 134,000 by the end of 2011. By February 2011 there were 118,000 personnel, nearly double the number 4 years previously.²²⁶ In spite of the considerable international investment in developing the force,²²⁷ however, attrition rates are high, the quality of its personnel has remained poor and corruption within it is reported to be widespread. In addition, the US approach to reform of the sector has been criticised for its emphasis on security as opposed to rule of law.²²⁸ Contemporary prognosis of police reform remains poor, a potentially critical factor for the application of procedures under the ICPC. According to a report in 2010 the ANP performs largely 'para-military tasks and is plagued by high rates of illiteracy (80%), attrition (20% per annum) and drug-use (20-50%) [to the extent that]...the prospect of having a force which can deliver justice or basic security – let alone effective counter-insurgency – seems as far away as ever.'²²⁹

In general terms the progress and effectiveness of justice sector reform between 2002 and 2007 was questionable. A review of the justice system by Amnesty International in 2005 suggested that the condition of the justice system had hardly moved forward from that of 2003. By 2005 it found it to be 'ineffective' and barely functioning in rural areas.²³⁰ Although restoration work faced considerable challenges arguably ineffective Italian leadership was culpable for the slow progress of reform during this period. A senior ROL official interviewed for this research in 2007 and then employed by the United Nations Assistance Mission in Afghanistan (UNAMA) described the Italian performance in its lead nation role as 'inept'.²³¹ Dobbins claims that 'Italy simply lacked the expertise, resources, interest and influence to succeed'²³² in its role as lead nation for justice reform. This was exemplified by its failure to co-ordinate legal personnel training programmes. The majority of these were divided amongst different international organisations and delivered in an ad

²²⁵ *ibid*; in 2008 the US invested \$1 billion in police reform

²²⁶ There were 62,000 in 2007; UNDP, note 15, p. 83. For February 2011 figures see UKFCO, *Afghanistan, Monthly Progress Report February 2011* available at <http://www.scribd.com/doc/52426287/Afghanistan-Monthly-Report-to-Parliament-for-February-2011>, p.2

²²⁷ International financial assistance in reforming the ANP amounted to US\$1.5 billion between 2002 and 2006; UNPD, note 15, p. 84. US investment in 2008 in police reform programmes alone amounted to \$1 billion; Carter et al, note 30, p. 30

²²⁸ *ibid*, p.30

²²⁹ *ibid*, p.31

²³⁰ *Amnesty International Report* (2005) available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/25_05_05_amnesty.pdf, p.36

²³¹ interview, senior ROL UNAMA official 17.10.2007

²³² Dobbins, *The Beginner's Guide*, note 13, chapter 1, p.101

hoc fashion, devoid of any monitoring or external evaluation. This reflected a wider trend with regard to general justice sector reform during the period between 2001 and 2007. While Justice for All, the I-ANDS and the Compact had provided a foundation for the development of Afghanistan's justice system, multiple reform programmes were being devised and implemented by an array of international donors in the absence of any integrated policy.²³³ Insufficient co-ordination between the Attorneys-General Office (AGO), the Ministry of Interior (MOI) and the ANP was also frustrating criminal investigations and the development of the state criminal system.²³⁴ This resulted in a call at a Rule of Law Conference in Rome on 2-3 July 2007 for a greater degree of synergy between the justice institutions and the international organisations engaged in justice sector work, development and reform.²³⁵ As a consequence of this the International Coordination for Legal Training (ICLT) was established in May 2007 with a mandate of co-ordinating the various legal training programmes that were being undertaken by international organisations.²³⁶

By this stage state-building strategy in Afghanistan appeared to be moving away from the lead nation approach that had been instigated at the Tokyo conference towards one that encouraged more local control and direction. Indeed, the concept of 'lead nation' was replaced by 'key partners' to reflect the number of donors and organisations, international financial institutions engaged in reconstruction work in the various state sectors.²³⁷ The Afghanistan National Development Strategy 2008-2013 (ANDS), approved in April 2008 and presented at the Paris Conference in June of that year, appeared to underline the importance of Afghan involvement in the future reform of the justice sector by warning that international donors 'should not attempt to impose an external judicial system that may not be accepted throughout the country.'²³⁸ In response to the ANDS process a National Justice Sector Strategy (NJSS) was drawn up in May 2008 providing a five-year strategy for the reform of the justice system designed to improve institutional capacity, coordination within the justice system and other state institutions and justice services.²³⁹ Alongside this

²³³ Bassiouni, M.C. and Rothberg, D. *Assessment of Justice Programs and Rule of Law Reform in Afghanistan and Future Directions*, 2 July 2007, available at

www.rolafghanistan.esteri.it/ConferenceRol/Menu/Ambasciata/Gil_uffici/, p.5

²³⁴ *ibid*, p.17-18

²³⁵ *ibid*, p.17

²³⁶ Tondini, note 201, p.67

²³⁷ *ibid*

²³⁸ ANDS 2008-2013, available at http://www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, p.69

²³⁹ *ibid*, p.64; NJSS and NJP available at http://www.and.s.gov.af/ands/ads_docs/index.asp

a National Justice Programme (NJP) was prepared to implement the designated reform targets and within this a greater emphasis was placed on the involvement of local actors at both operational and policy-making levels. In addition, funding for future reform programmes would be orchestrated by the WB and the Afghanistan Reconstruction Trust Fund (ARTF) according to needs established by the Afghan government, thereby installing an Afghan demand-led programme for development to replace one driven primarily by bilateral aid assistance.²⁴⁰

Legal training also reflected the drive towards increased Afghan involvement. In 2006 courses conducted by the IDLO were taught only by international actors. In 2007 50% of the courses were taught by Afghan personnel and by 2008 the training course for MOJ officials was run entirely by Afghan staff.²⁴¹

While official reconstruction efforts in the justice sector have been geared towards increased Afghan participation, particularly following deliberations at the 2007 Rome Conference, a review of justice sector reform concluded in 2010 that 'the Afghan ownership in justice reform is yet to be met and ...we are probably experimenting with a mixed regime, in which external players still influence de facto the decision-making process.'²⁴² International actors, organisations and donors continue to influence fundamental justice sector reconstruction activities including government policy-making, legal education and training and legislative reform. Key policy documents such as the NJP and the NJSS were largely conceived and drafted by international personnel.²⁴³ Forums such as the Criminal Law Committee continue to be chaired by officials from international bodies.²⁴⁴ Training programmes are predominantly led by US organisations. The Justice Sector Support Programme (JSSP), funded by the US Bureau of International Narcotics and Law Enforcement Affairs (INL) has provided training to the AGO since 2006. It also offers police-prosecutor training and mentoring to the AGO and the MOJ. USAID, through the Afghan Rule of Law Project (ARoLP) provides training assistance to the MOJ and the Supreme Court. By June 2008 it was purported to have had trained to more than 70% of

²⁴⁰ Tondini, note 201, p.71

²⁴¹ *ibid*, p.79

²⁴² *ibid*, p.87

²⁴³ *ibid*, p.88

²⁴⁴ Jointly chaired by UNODC and JSSP

all Afghan Judges.²⁴⁵ The US lead in legal training and education reflects its position as the largest financial contributor to justice sector reform since 2002, representing more than 60% of total donor contributions or pledges to 2008. Its hegemony in the justice arena is likely to continue into the future.²⁴⁶ In 2008 it was estimated that approximately 83% of future bilateral projects to be conducted under the NJP would be carried out by the US.²⁴⁷ According to Tondini, continued US and international dominance in the field of justice sector reform in Afghanistan perpetuates a mixed-ownership model of reconstruction and impedes the expansion of the important ingredient of local ownership in the area. And for Tondini, 'the lack of local ownership has jeopardised the success of reforms,'²⁴⁸ which would include the ICPC and the CNL. It is also indicative of a continued top-down approach to the development of the overall justice system.²⁴⁹

Recent developments which impact on justice development in Afghanistan include a commitment made by the Afghan government and the international community at a conference in Kabul in July 2010 to accelerate Afghanistan's ability to govern itself and provide rule of law protections for its citizens through improved policing, justice and anti-corruption.²⁵⁰ This was followed by a summit in Lisbon in November 2010 when NATO powers committed to the withdrawal of International Security Assistance Force (ISAF) troops and the transition of security control to the Afghan government by the end of 2014.²⁵¹ This transition will undoubtedly affect the application of the ICPC and the CNL. Significant doubts remain over the ability of the Afghan state to provide justice and implement state legislation such as the ICPC and the CNL following the transition stage.

²⁴⁵ USAID, *Justice Sector Development Program* (26 June 2008) available at http://www.fbo.gov/download/c59/c599fda28d49cf912080a39ce6d94561/FINAL_RFP-ISUUED_June_26_2008.doc, p.9

²⁴⁶ The US provided more than US\$270 million between 2002-2008 out of a total of US\$434.8 million; Tondini, note 201, p.84

²⁴⁷ *ibid*, p.83

²⁴⁸ *ibid*, p.97

²⁴⁹ International Crisis Group, *Reforming Afghanistan's Broken Judiciary*, Asia Report No. 195 (17.11.2010) available at <http://www.crisisgroup.org/en/regions/asai/south-asia/afghanistan/195-reforming-afghanistans-broken-judiciary.aspx>. ICG criticised the appointment of a private US contractor to monitor and evaluate traditional justice councils. According to it 'outsourcing a task as delicate as monitoring the complex politics of tribal justice to a (US) contractor with limited knowledge of the region is to nobody's benefit,' p.2

²⁵⁰ Kabul Conference (20 July 2010) <http://afghanistan.hmg.gov.uk/en/conference>

²⁵¹ At the Lisbon Summit ISAF's 48 contributing countries established a timetable for lead responsibility for security to be transferred to Afghan forces by the end of 2014; Lisbon Summit Declaration (20 November 2010) available at http://www.nato.int/cps/en/natolive/official_texts_68828.htm. See Table 2 for the current composition of international contributions to ISAF.

The international community and the Afghan government have invested considerable effort and expense in attempting to reconstruct Afghanistan's criminal law framework since 2002, which has involved significant legislative reform in addition to the ICPC and the CNL, and numerous programmes to provide legal education and training and improve infrastructure. The strategy for reconstruction evolved from one driven by a lead nation approach between 2002 and 2007 to one which emphasised greater co-ordination between the justice institutions and the huge number of donor organisations involved as well as enhanced Afghan ownership. In reality, however, international actors and organisations, particularly those that are US-led, continue to influence decision-making and programmes of reform. The majority of technical assistance is currently imposed externally rather than co-ordinated by the Afghan government.²⁵² While reform appears to continue to be dependent on foreign aid, the over-riding external influence on the state justice sector, including that concerned with criminal law, may impact on the local acceptance of new laws such as the ICPC and the CNL and contribute to constraining the development of rule of law.²⁵³ The overall prognosis after more than nine years of reform in this respect is not good. Indeed, the Afghan government acknowledged in its ANDS report that by 2008 efforts to establish rule of law in the country continued to be undermined by amongst other matters 'weak legislative development and enforcement [and an] ineffective and poorly defined justice system.'²⁵⁴ The same report observed that the system was still constrained by 'weak infrastructure...[a] lack of trained staff [and] poor education and training.'²⁵⁵ International Crisis Group's more damning assessment of the justice system in November 2010 found it to be 'in a catastrophic state of disrepair.'²⁵⁶ This suggests that in spite of all the effort and expense involved in reconstructing the justice sector little genuine progress had been made since 2002.

Section 3.5 Challenges to the State Criminal Justice System and Constraints on Transplant Reception

There are a number of contemporary challenges to the operation of the state criminal justice system in Afghanistan that may condition the application and reception of

²⁵² Tondini, note 201, p.98

²⁵³ *ibid*; it is estimated that US \$600 million will be required to meet reform requirements in the next five years, p.84

²⁵⁴ ANDS, note 238, p.61

²⁵⁵ *ibid*, p.65

²⁵⁶ ICG, note 249, p.1

transplanted law currently in force, such as the ICPC and the CNL, and which therefore require examination.

3.5.1 Cultural dynamics and the legitimacy of the state criminal justice system

It has been noted that although state codified law has existed since it was first introduced in the late 19th century it has not always been applied in the state criminal courts. Legal practitioners have often resorted instead to Islamic and customary approaches to justice. Moreover, the application of state justice mechanisms has historically been confined mainly to urban areas. The majority of the population, largely illiterate and living in rural and provincial areas, have preferred to rely on customary approaches to justice and *Shari'a*.

The aversion of large sections of the Afghan population to state criminal justice mechanisms is to some extent the result of general antipathy towards central administrations and distrust of centralisation efforts, often regarded as alien and the product of foreign intrusion. In contrast to other countries in the region such as India, Iran and China, Afghanistan has rarely enjoyed a strong central state exerting directive control over the totality of its population. Rather, the Afghanistan state has a history of being 'soft centred', with the writ of the central state struggling to extend beyond urban centres and its fragile existence dependent upon tribal and ethnic support. Tribal and ethnic affiliations are considered to be more relevant and permanent to the largely rural population than allegiances the state, whose directives and influences can seem comparatively unrelated to the hardships of daily existence.²⁵⁷

The geographical makeup of the country is a contributing factor to the peripheral influence that the state enjoys over the population. Its high mountainous areas, difficult terrain and consequent insubstantial transport system means that many rural areas have little interaction with urban centres and centrally directed policies. Instead, many communities have had to be self-sufficient, relying on regional as opposed to national market economies and managing their own administrative affairs and criminal justice disputes with reference to *Shari'a* and customary law rather than state mechanisms.²⁵⁸ Such factors

²⁵⁷ Roy, O. *Islam and Resistance in Afghanistan*, Cambridge University Press, Cambridge (1986), p.30

²⁵⁸ Nojum, N. *The Rise of the Taliban in Afghanistan*, Palgrave (2002), p.6

have made for introspective, conservative communities not easily accepting of the state's various attempts at social, economic and political integration or indeed its attempts at imposing criminal justice mechanisms.

It is noteworthy also that historical analysis of attempts to promote rule of law in Afghanistan demonstrate that when the state has attempted to impose a justice system on the population that challenges the authority of Islamic law and the interpretative power of the *ulama* it has struggled for legitimacy and has occasionally met with strong resistance. Barfield noted in 2001 that 'for the past 150 years, there's been a major struggle between urban elites in the capital attempting to push the rule of law onto the countryside, and the countryside looking at it less as the rule of law and more as the imposition of state central authority, which they reject.'²⁵⁹ Ammanullah's 1923 Constitution, introduced under a modernising agenda, incited rebellion leading to his dethronement because it challenged the authority of tribal leaders and the *ulama* and sought to reduce reliance on informal justice mechanisms which had so much relevance to existence in rural areas.²⁶⁰ Ammanullah's demise has served as a stark warning to subsequent leaders of the Afghan state of the problems they are likely to encounter in attempting to extend their rule and centralised justice mechanisms beyond urban areas. Lau warned in 2001 that 'past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or particular interpretations of Islamic law is liable to be met with protests and perhaps even civil unrest.'²⁶¹ Moreover, it is notable that when Afghan rulers have embarked on programmes of modernisation facilitated by legal reform to extend the power and reach of the central state, there is a propensity for it to be met with resistance from local power-holders, particularly tribal and religious leaders, when the laws are construed as intent on undermining or circumventing their authority. Such was the case with legal reforms instituted not only by Ammanullah but also later by Daoud. As Suhrke points out 'all the modernising regimes [in Afghanistan] were defeated.'²⁶²

The reach of the central state and its ability to impose its criminal justice system on the rural population has also been undermined by a history of local reservations over its legitimacy brought about by persistent reliance by Afghan rulers on foreign assistance.

²⁵⁹ Barfield, note 196, p. 400

²⁶⁰ Suhrke, note 84, p. 216

²⁶¹ ILF, note 10, para. 10

²⁶² Suhrke, note 138, p.1297

Rather than gaining authority based on support from within Afghanistan, those in control of the state – and state justice mechanisms – have long been dependent on financial assistance from external powers. Abdul Rahman Khan, under British sovereignty, relied on the British arms to strengthen his state system. Between 1955 and 1978 the Soviet Union provided US\$2.52 billion and the US \$533 million in aid to support state rulers²⁶³ and the *mujahedeen* were later supported by the US and Saudi Arabia during Soviet occupation. The current regime, under President Karzai, has received unprecedented levels of foreign financial assistance. It is estimated that 90-95% of all state development costs and 69% of all government expenditure is financed by external aid, more than any other previous regime.²⁶⁴ The dependence by a succession of state rulers on foreign financial assistance to maintain power and control has resulted in a series of rentier states, particularly since 1978, propped up by external aid rather than by an internal base of support. This dependence increases doubt over whether measures introduced by the Afghan state are for the best interests of the Afghan people or the result of manipulation by its foreign sponsors. There is considerable mistrust over the intentions of the foreign backers of the state. The collective experience of Soviet invasion, the US abandonment of the country following Soviet withdrawal, the support by neighbouring countries provided to factions involved in the civil war and the current intervention by international forces, which provides strategic access in the region, has created a deep suspicion that foreign powers support the Afghan state only to serve their own interests.²⁶⁵

These suspicions increase antipathy towards the state regime and its justice system, and reduce their legitimacy and reach, which continue to remain largely confined to urban areas. The formal system of justice is relevant for only 10% of the population.²⁶⁶ It is, as the EU has acknowledged, 'far removed from ordinary people's everyday life'.²⁶⁷ The legitimacy of the state justice system, limited by a devastated infrastructure, the corrupt practices of some of its officials whose capacity is questionable and fluctuating regime change has contrasted unfavourably to the permanency and relevance of *Shari'a* and customary practices whose authority derives from the more meaningful sources of religion

²⁶³ Rubin, note 24, p.20

²⁶⁴ Suhrke, A. *The Case for a Light Footprint: The International Project in Afghanistan 2010*, Anthony Hyman Memorial Lecture, SOAS, 17.03.2010; available at <http://www.soas.ac.uk/ccac/events/anthonyhyman/file58420.pdf>

²⁶⁵ Thier, note 126, p.5

²⁶⁶ European Commission, *EU Commitment to the Governance and Rule of Law in Afghanistan* (July 2007), held on file, p.11

²⁶⁷ *ibid*, p.6

and the collective requirements of the local community. The Afghan state, Misdaq reminds us, has always been 'in the shadow of the tribe.'²⁶⁸ And so, state law has always lived in the shadow of *Shari'a* and customary law. Tribal, ethnic and religious affiliations and consequent customary and Islamic practices have more resonance and greater appeal to the majority of the local population. As a result the norms and rituals provided for in any state law in Afghanistan, are traditionally rarely 'widely shared' by the local population.

These issues are likely to impact on the potential reception of state laws such as the ICPC and the CNL which have been developed by way of legal transplantation. If state laws have traditionally had less appeal to Afghans, new transplanted state laws are less likely to be considered meaningful and appropriate to them with the result that the laws are consequently less likely to be accepted and to achieve their objectives.

Moreover, local resistance to foreign conquest and intrusion and to foreign promoted attempts at state modernisation might imply a cultural resistance in Afghanistan to any new transplanted law such as the ICPC and the CNL, dependent on foreign sources, which would impact on their application and acceptance. Cultural resistance to a transplant may adversely affect its potential reception.²⁶⁹ What, however, is meant by 'culture' and indeed 'Afghan culture' by which it is possible to determine if there might be any cultural resistance to these transplanted laws? The concept of 'culture' is complex and difficult to define. According to Williams it is 'one of the two or three most complicated words in the English Language.'²⁷⁰ A traditional 'natural history' anthropological approach to defining culture implies that it is handed down, preserved, fixed and perhaps an obstacle to change.²⁷¹ This perspective might suggest that any legal transplant that fails to be attuned to the culture of its host country is likely to meet resistance. It is an outlook, however, that has recently been challenged. Current anthropological approaches towards culture tend to regard it not as an essential, inherited fixed tradition, but rather as something that is flexible and capable of change. Tapper's 2008 review of Afghan culture supports this stance.²⁷² While Tapper maintains that it is not possible to say with any authority what culture or indeed Afghan culture actually is, it is nevertheless more likely to be 'a dynamic,

²⁶⁸ Misdaq, note 117, p.4

²⁶⁹ Marafioti, note 12, chapter 2, p.91

²⁷⁰ Williams, R. *Keywords: A Vocabulary of Culture and Society*, Oxford University Press (1983), p.76

²⁷¹ Dupree, N. (2005) in *Security with a Human Face; Challenges and Responsibilities. Afghanistan National Human Development Report 2004*, UNDP 2005, p.233

²⁷² Tapper, R. *What is Afghan culture? An anthropologist reflects*, Anthony Hyman Memorial Lecture, SOAS, (13.03.2008), notes on file

changing, flexible collection of values and practices.²⁷³ In contrast to the natural history perspective, Tapper's view of Afghan culture would auger well for the potential receptivity of legal transplants such as the ICPC and the CNL that are intent on bringing about change. Rather than being fixed and inflexible Afghan culture may be capable of negotiation and alteration and therefore of absorbing new, transplanted legal concepts and procedures.

3.5.2 Narcotics and Organised crime

In a similar manner to other post-intervention countries seeking to emerge from conflict, Afghanistan has experienced an increase in criminal activity.²⁷⁴ In Afghanistan's case this has to a large extent been centred around the opium industry which represents a huge threat to rule of law, security and economic development efforts.

The narcotics industry had expanded during the Soviet occupation in the 1980's and the civil war in the 1990's and the consequent inability of central government to enforce prohibitions on cultivation and trafficking. The collapse of the licit economy and agricultural trade forced farmers to undertake poppy cultivation as a means of livelihood, a practice encouraged by ethnic warlords who were able to engage in trafficking enterprises by establishing ethnic trade links across Afghanistan's borders.²⁷⁵

The Taliban imposed a total ban on opium poppy cultivation in July 2000 on the basis of its contravention of Islamic principles, resulting in a dramatic fall in production in 2001.²⁷⁶ On the whole, however, during the Taliban period the opium trade continued largely unchecked by central authorities as a *de-facto* legal enterprise and, until the demise of the regime, it was its primary source of foreign exchange.²⁷⁷ The removal of the Taliban, however, brought about dramatic changes to the opium economy, resulting in a rapid

²⁷³ *ibid*

²⁷⁴ Kuovo, note 32, chapter 1, p.41

²⁷⁵ UNODC, *The Opium Economy in Afghanistan. An International Problem* (2003) available at www.unodc.org/pdf/publications/afg_opium_economy_pdf, p. 7. See Appendix 6 for an analysis of Afghanistan's opium economy between 1924 and 2005

²⁷⁶ Goodhand, J. 'Frontiers and Wars: the Opium Economy in Afghanistan,' (2005) 5(2), *Journal of Agrarian Change*, 191-216, p.200

²⁷⁷ UNODC, *Afghanistan Opium Survey*, Executive Summary Report (August 2007) available at www.unodc.org/documents/crop-monitoring/AFG07_ExSum_web.pdf, p. v

resurgence in poppy cultivation, epitomised by a leap in production from 200 to 3,400 metric tons between 2001 and 2002.²⁷⁸ The rise in poppy prices following the Taliban period of prohibition encouraged poor farmers to plant poppy to clear their debts and wealthier farmers to turn land into profit. Furthermore, as a result of the US policy of giving money to local commanders in return for their support in the 'war on terror' the money market was flooded with millions of US dollars which were used to create loans to farmers to finance future poppy crops.²⁷⁹ Between 2002 and 2004 opium cultivation increased from 3400 to 4200 metric tonnes.²⁸⁰ At the time the ICPC and the CNL were introduced the industry was still expanding. By 2004 opium cultivation had increased to an unprecedented 131,000 hectares, a rise of 64% from levels in 2003.²⁸¹ Afghanistan was producing 4,200 metric tonnes of opium, accounting for 87% of global poppy cultivation.²⁸² A smaller crop in 2005 produced a similar amount due to more favourable weather and environmental conditions.²⁸³

There are correlations between the opium trade and the financing of terrorism and independent armed factions as well as the promotion of corruption which all present destabilising challenges for the Afghan government and adversely impact on reconstruction and reform efforts, including those related to criminal justice and counter narcotics in the form of the application of the ICPC and the CNL.

According to a 2009 UNODC report criminal syndicates 'are the main organisers and beneficiaries of the opium trade in Afghanistan' and organised crime financed by the drug trade represents 'a tremendous security threat' in Afghanistan.²⁸⁴ Criminal groups profiting from narcotics trafficking range from ethnically-based small gangs to large organisations engaged in transnational operations. It is estimated that there are between 25 and 30 high-level networks which largely dominate the local opium economy, a further 500 to 600 mid-

²⁷⁸ Blanchard, C.M. 'Afghanistan: Narcotics and U.S. Policy' in Barton, L.V., (ed.) *Illegal Drugs and Governmental Policies* (2007) Nova Science Publishers, p. 102

²⁷⁹ Goodhand, J. 'Corrupting or Consolidating the Peace? The Drugs Economy and Post-Conflict Peacebuilding in Afghanistan', (2008) 15(3), *International Peacekeeping*, 405-423, p.409

²⁸⁰ UNODC, World Drug Report 2005 available at http://www.unodc.org/pdf/WDR_2005/volume_2_chap5_opium.pdf, p.181

²⁸¹ *ibid*, p.179

²⁸² *ibid*, p.39

²⁸³ Blanchard, note 278, p.99

²⁸⁴ UNODC, *Addiction, Crime and Insurgency. The Transnational Threat of Afghan Opium*, (2009) available at www.unodc.org/docs/data-and-analysis/Afghanistan/Afghan_Opium_Trade_2009_web.pdf, p.105- 106

level trafficking networks and that drug related funds accruing to warlords approximates US\$200 to US\$400 million a year.²⁸⁵

The opium economy provides substantial financial leverage for factional commanders and warlords to maintain their independence from central rule and resist attempts to impose the rule of law upon them, often through violence. In September 2008 the Head of the Counter Narcotics Tribunal Appeals Court, Judge Alim Hanif, was shot dead by the Afghan 'mafia' according to the Ministry of Counter Narcotics.²⁸⁶ Furthermore, in 2010 Judge Mehro Ahmed, the country's most senior counter narcotics Judge confirmed that she had been offered bribes and received death threats from criminal gangs involved in the drug trade.²⁸⁷ In addition, profits from the opium trade have enabled warlords to integrate themselves into the state apparatus and gain influential and representational power on and within national, executive and judicial institutions, including the army, police, intelligence services and the judiciary.²⁸⁸ The entry of warlords into national politics has impeded coherent government of the country. From these positions of power commanders and former warlords have been able to corrupt government and judicial institutions from within and exert political influence in ways that undermine the state criminal justice system. This political influence can provide protection against prosecution and imprisonment and extends to the top echelons of the justice system.²⁸⁹

3.5.3 Corruption

Drug-related corruption is recognised as the dominant source of corruption in Afghanistan, compromising provincial and local government agencies and undermining legitimate efforts towards state-building and political reform.²⁹⁰ There are strong links between the narcotics trade and public service corruption in Afghanistan, which is reportedly significant

²⁸⁵ *ibid*, p. 2

²⁸⁶ Ministry of Counter Narcotics, *By Assassinating our officials the mafia will never stop us for countering the Narcotics issue*, 04.09.2008, available at http://www.mcn.gov.af/press_release4.html

²⁸⁷ Channel 4, *Birth of a Narco-State*, Episode 3 of 'Our Drugs War,' (16.08.2010)

²⁸⁸ UNODC, note 284. In 2005 the Human Rights Watch estimated that 60% of Members of Parliament had links to warlordism, p. 106

²⁸⁹ Shaw, M. 'Drug Trafficking and the Development of Organized Crime in Post-Taliban Afghanistan,' in Buddenberg et al (eds) *Afghanistan's Drug Industry: Structure, Functioning, Dynamics, and Implications for Counter-Narcotics Policy*, Washington, DC: UNODC and World Bank, (2006), p.189-200; Carter, note 30, p.33

²⁹⁰ Asia Development Bank et al, *Fighting Corruption in Afghanistan. A Roadmap for Strategy and Action* (16.02.2007) available at <http://www.mcn.gov.af>, p.6

among the police and the judiciary.²⁹¹ Corrupt officials, often appointed as a result of a combination of patronage and the payment of a bribe, are empowered from their state positions to exact bribes from other officials and the public.²⁹² State justice and law enforcement personnel, facing the harsh realities of economic life typified by poor salaries and rising costs, use their positions of authority to profit from the proceeds of the drug trade. The result, according to a 2010 report is that 'drugs and bribes are the two largest income generators in Afghanistan.'²⁹³

Corruption has become a normal feature of daily existence for the majority of the population. Between 2009 and 2010 52% of adult Afghans paid bribes to public officials.²⁹⁴ Moreover, the huge sums of monies involved in the drug industry have transformed the level of corruption in the country to the extent that revenue exacted from bribes in 2010 alone amounted to \$2.8 billion.²⁹⁵ As a result between 2005 and 2010 Afghanistan dropped from 117th to 176th out of 178 countries in Transparency International's Corruption Perception Index, making it the third worst country in the world for corruption.²⁹⁶

What is particularly troubling as far as the formal criminal justice system is concerned is that the police and the courts are consistently perceived by Afghans to be the most corrupt of the state institutions.²⁹⁷ Asia Foundation reported in 2008 that 51% of people interviewed who had contact with the judiciary and the courts between 2007-2008 had experienced instances of corruption.²⁹⁸ Although attempts have been made by the Supreme Court to tackle corruption within the judiciary, most notably with the arrest of 92 judges in 2009 following investigation by the Judicial Inspectorate,²⁹⁹ a 2010 survey

²⁹¹ UNODC, *Corruption in Afghanistan. Bribery as reported by the Victims*, (January 2010), available at www.unodc.org/.../Afghanistan/Afghanistan-corruption-survey2010Eng.pdf, p.4

²⁹² Jamali, A. 'Afghanistan's Drug problem Requires An International Solution', *Eurasia Daily Monitor* (2004), 1(68) 68 available at www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=26724

²⁹³ UNODC, note 291, p.4

²⁹⁴ Integrity Watch Afghanistan, *Afghan Perceptions and Experiences of Corruption. A National Survey 2010*, available at www.iwaweb.org, p.9-10

²⁹⁵ UNODC, note 291, p.4

²⁹⁶ 'Fighting Corruption in Afghanistan,' ARTF Donors Meeting, Discussion Draft, Paris (05.06.2008) available at <http://www.u4.no/training/incountry-open/afghanistan-materials-2009/background-paper-fighting-corruption-in-afghanistan-artf.pdf>, p.1. See also Transparency International, *Corruption Perceptions Index 2010*, available at http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

²⁹⁷ Barfield, note 196, p.440

²⁹⁸ Asia Foundation, note 39, p.76

²⁹⁹ Carter et al, note 30, p.32; according to Transparency International the Major Crimes Task Force has 'achieved little in terms of stopping corrupt money flowing out of Afghanistan,' interview, member of Defence and Security Counter Corruption team, Transparency International, 26.04.2011.

confirmed that the courts and the police remain the most corrupt of the state institutions.³⁰⁰ Corruption among the judiciary, police and state justice personnel erodes the credibility and legitimacy of the state. More specifically, it inhibits public confidence in the state criminal justice system, which is likely to undermine the application of state criminal justice laws and their potential for achieving their objectives. Disillusioned by the state system the public are more likely to resort to non-state justice mechanisms to seek justice.³⁰¹ Moreover the abuse of justice by those in power, including the police and judiciary, is capable of fuelling insurgency. If ordinary people without power are unable to obtain justice under the state system, this not only increases their dissatisfaction with the state and its foreign backers but also the appeal of justice under the Taliban, which although acknowledged as punitive, is trusted. Ledwidge noted of Taliban courts in Helmand that they were 'the only effective and trusted tribunals of justice. Above all, unlike the state courts, their decisions are not dependent on the ability to pay bribes and will be enforced.'³⁰² The inability to obtain justice under the state system has been exploited by the Taliban, furthered their appeal and perpetuated the insurgency which continues to represent a huge problem for security in Afghanistan, in turn impeding the application of state criminal justice mechanisms.³⁰³

3.5.4 Insurgency and Insecurity

The ANDS report noted that 'security constraints in certain parts of the country make service delivery [of state justice] difficult or impossible.'³⁰⁴ Insecurity remains one of the greatest impediments to state-building efforts in Afghanistan, undermining the implementation of state development policies and damaging confidence in the government and its ability, through new criminal justice measures such as the ICPC and the CNL, to promote rule of law.³⁰⁵ Afghanistan's history of conflict has continued beyond the removal of the Taliban from power in 2001, and the current government faces a range of security threats from the Taliban and al Qaeda, factional militias and drug-traffickers, which threaten to de-stabilise the country.

³⁰⁰ Integrity Watch, note 294, p.71-74

³⁰¹ *ibid*, p.12; 50% of respondents who experienced corruption in the state system referred matters to non-state institutions

³⁰² Ledwidge, F., 'Justice and Counter-Insurgency in Afghanistan: A Missing Link,' (Feb. 2009), 154 (1) *RUSI Journal*, p.7

³⁰³ Carter et al, note 30, p.vii.

³⁰⁴ ANDS, note 238, p.65

³⁰⁵ *ibid*, p.53; Thier, note 126, p.2-3

The armed conflict involving the Taliban has escalated since 2005. In 2006 more than 4,400 Afghans, which included 1,000 civilians, died as a result of anti-government violence.³⁰⁶ Terrorist attacks on UK and coalition forces have increased since 2007 and include indiscriminate and regular attacks on government and justice targets including the Prisons Directorate and Ministry of Justice.³⁰⁷ International military intervention has grown rapidly since 2006 to the extent that there are now 130,000 NATO forces, divided amongst 37 troop contributing countries.³⁰⁸

The ANDS strategy committed the government to expand the Afghan National Army to 80,000 personnel by the end of 2010 and the Afghan National Police and Afghan Border Police to 82,180 in an effort to increase the power of the government to inhibit future security threats.³⁰⁹ While these threats continue, and terrorist acts are committed with impunity and the power of armed groups remains unchecked, it is probable that public confidence in the ability of the central state and its legal authorities to ensure justice will be further eroded. This in turn is likely to adversely affect the application and relevance of criminal justice mechanisms such as those provided for in the ICPC and the CNL.³¹⁰

Conclusion

I have argued in Chapter 2 that the reception of a criminal law legal transplant will be conditioned by local contextual issues. The legal history and traditions of a country will inform the extent to which a transplanted law may be regarded as meaningful and appropriate. Constitutional reform, criminal justice infrastructure development and capacity building and the challenges that the justice sector face will impact on the application of a transplanted criminal law and the potential of it achieving its objectives. Considering these issues is therefore vital to evaluations of the ICPC and the CNL.

³⁰⁶ UNDP, note 15, p. 7

³⁰⁷ Attacked on 11.02.2009; see <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/asia-oceania/afghanistan>

³⁰⁸ The total number of soldiers trebled between 2006-2009; Suhrke, note 264

³⁰⁹ ANDS, note 238, p.55-57

³¹⁰ Thier, note 126, p. 4

In 2005 the Afghan Independent Human Rights Commission (AIHRC) noted that Afghans demonstrated 'a rich understanding of and strong desire for justice.'³¹¹ According to the report 'Afghans believe justice to be a general medium through which to improve specific aspects of their life. Justice for many also meant the upholding of basic human rights.'³¹² The ICPC and the CNL were introduced in Afghanistan in 2004 and 2005 to improve accessibility to these ideals, to contribute to the process of reconstructing the country's state criminal law framework and enhance the development of rule of law. These were hugely challenging tasks facing the new administration and its international donors following more than 25 years of conflict. By 2001 the state system barely functioning, with limited capacity and infrastructure and uncertain knowledge of relevant applicable laws. Moreover, positive state laws had a historical legacy of being regarded as less relevant than Islamic and customary law, their legitimacy sustained by the authority of Islam, the dominant religious faith amongst Afghan people, and the regard to which justice that is tied to the collective consciousness of the community is held. Furthermore, when modernising state legislation has been introduced which has been perceived as undermining the authority of practitioners of customary and Islamic law, it has met with resistance. The legal traditions and the historical features that shape criminal justice in Afghanistan have conditioned the reception of new state laws in the past and are likely to do so now and in the future.

The ICPC and the CNL were introduced during a period of justice reconstruction in Afghanistan characterised by a 'lead-nation' strategy resulting from the UN's 'light footprint' stance on involvement, whereby Italy assumed responsibility for the justice sector and the UK took the lead in the field of counter narcotics. This period was typified by a top-down approach to justice reform led largely by international donors and which witnessed extensive law reform. They were two of a number of laws that were introduced between 2002 and 2006 in the field of criminal law which were externally-led and drafted with significant international input. Legal training and capacity building programmes were initiated by a large number of international donors, but there was a lack any real co-ordination between them and insufficient Afghan involvement. While the reconstruction strategy changed following the 2007 Rome Conference to allow for greater local engagement in the reconstruction process, it remains largely controlled by international

³¹¹ AIHRC, *A Call for Justice* (2005) available at http://www.aihrc.org.af/Rep_29_Eng/rep29_1_05call4justice.pdf, p.41

³¹² *ibid*, p.14

donors, and particularly by the US. While the continued international presence in the reconstruction of the state criminal law system may be inevitable to ensure financial assistance for future training and capacity building to support and augment the proper application of new laws such as the ICPC and the CNL their association with international assistance may alienate the Afghan public from them, given that there is a history of local mistrust of the foreign backers of the Afghan state.

In spite of all the effort and expense that has been put into reconstructing Afghanistan's state justice system since 2001 it still faces considerable challenges, not least those presented by the narcotics industry, insecurity and corruption which damage its legitimacy and inhibit its potential to appeal to Afghans. The international emphasis on security over justice and rule of law and pervasive corruption and abuse of power within justice institutions increase local disillusionment in the state criminal justice system and drive insurgency, which in turn undermines state justice mechanisms and reform. These contemporary challenges to the state justice system are likely to constrain the application and reception of new transplanted laws such as the CNL and the ICPC.

These contextual considerations appear perhaps to provide a bleak prognosis for the potential reception of these two laws. Nevertheless, it is important to note that the development of that state justice system as a whole has been informed by the transplantation of law, namely codified Islamic law and western positive law of a civil tradition. Afghanistan has a history of transplant reception. Furthermore, if modern anthropological approaches are applied, the flexibility and dynamism of Afghan culture might auger well for the potential successful reception of the new procedures for criminal procedure and counter narcotics introduced by the ICPC and the CNL. A clearer picture of the real progress of these laws, however, should emerge from their evaluation.

4 An Evaluation of The Interim Criminal Procedure Code 2004

Introduction

This chapter examines the Interim Criminal Procedure Code, promulgated into law in by Presidential decree in February 2004¹ and evaluates it, applying the evaluative test proposed in chapter 2. It relies on original qualitative material derived from interviews with and evidence obtained from a range of senior Afghan legal representatives and international personnel based in Afghanistan between 2007 and 2011 who have experience of the law's application. It is organised into four sections. Section 4.1 outlines the central provisions of the law. Section 4.2 examines the reasons for its development and Section 4.3 clarifies why it can be considered to be a legal transplant. In Section 4.4 the various components of the proposed evaluative test for legal transplants are applied to the ICPC. Drawing on quantitative data and qualitative evidence this section of the chapter considers the manner in which the law is being applied, its compatibility with other sources of state criminal law, the extent of its correlation with Islamic principles of criminal justice and of its prospects of being considered meaningful and appropriate both amongst Afghan legal practitioners and the general public. It also examines the motivations behind the introduction of the law and the possible justifications for relying on legal transplantation as a means of developing it and their impact on its reception. In addition, it assesses the extent to which the ICPC has achieved its objectives before reaching a conclusion on the issues of whether or not it has been successfully received and whether it was reasonable to have relied on legal transplantation to develop this law.

Section 4.1 The ICPC: Provisions and Procedures

The ICPC's 98 articles, divided amongst 15 chapters, collectively prescribe procedural rules to govern all the stages of criminal procedure from the arrest and detention of individuals, the investigation and prosecution of criminal offences,² trials and the

¹ Interim Code of Criminal Procedure for Courts, Official Gazette No. 820, 25 February 2004

² chapters 1 to 7, articles 1-41

implementation of decisions³ as well as the appeal stage, including appeals to the Supreme Court.⁴

The first 41 articles and 7 chapters are concerned with the provisional arrest and preliminary investigation stages of proceedings. The Code provides that following the arrest of a suspect, the police are entitled to search the individual and any relevant premises and seize evidence which they consider to be essential to prosecute a criminal offence.⁵ At the time of arrest, suspects are to be informed of their right to remain silent and their right to defence counsel.⁶ The police are able to interrogate arrested individuals within 24 hours of their arrest⁷ and they must report to the primary prosecutor within this preliminary period following arrest detailing the nature of any criminal offences and the outcome of their interrogations.⁸ In terms of the formalities of interviews, if the police decide to take the suspect to the police station for questioning, they should inform him or her of the reasons for their arrest,⁹ their right to remain silent¹⁰ and their right to be represented by defence counsel.¹¹ Interviews are to be recorded in writing.¹²

The primary prosecutor is required to commence the preliminary investigation within 48 hours of receiving the case from the police.¹³ This investigative stage is stated to be concerned with 'the establishment of the truth,' an important indicator of inquisitoriality.¹⁴ The primary prosecutor is entitled to question the suspect and is empowered to 'collect all relevant evidence' in whatever way they deem fit¹⁵ and the suspect is entitled to representation by a defence counsel,¹⁶ which may be free if they do not have the financial means to appoint one.¹⁷

³ chapter 8, article's 42-62

⁴ chapters 9 and 10, articles 63-80

⁵ article 32

⁶ article 5(7)

⁷ article 31

⁸ article 21(1)

⁹ article 31

¹⁰ article 5

¹¹ article 18

¹² article 2(2)

¹³ article 34(1)

¹⁴ article 23(2)

¹⁵ article 37(1)

¹⁶ article 38(2)

¹⁷ article 19

Primary prosecutors can conduct investigations both on their own and in conjunction with the police, who they will instruct.¹⁸ Key investigative ‘tools’ include inspections, searches, seizures, expert examinations or interrogations¹⁹ but these are offered as suggestions rather than limitations and the law omits to provide any guidelines on procedure for collating evidence using these techniques.²⁰

The Code provides that the primary prosecutor must decide within 15 days of the original arrest whether to release the suspect, indict them or apply to the Court to continue to detain them for a further 15 days.²¹ If the prosecutor determines that there is insufficient evidence to support a conviction at the conclusion of the investigation, they must dismiss the case and release the suspect.²² Alternatively, if the prosecutor decides to proceed with a prosecution, they must submit an act of indictment to the Court, requesting a trial to assess the liability of the suspect.²³ The indictment should include an identification of the suspect and a description of the criminal offence alleged to have been committed.²⁴ In addition to the act of indictment, the primary prosecutor is required to forward his or her file containing all documents gathered during the investigation to the Court,²⁵ which should be made available to the accused²⁶ and their defence counsel.²⁷

After receiving the indictment the Court must immediately order ‘notification of the deed’ indicating the time and date set for the trial.²⁸ This deed should name the accused, define the crime they are alleged to have committed and refer to any factual circumstances in support of the prosecution’s case.²⁹ It should be served on the accused, any defence counsel and the primary prosecutor at least 5 days before the trial date,³⁰ which should be listed to take place no later than 2 months from the filing of the indictment.³¹

¹⁸ article 23

¹⁹ article 37(3)

²⁰ See Appendix 4 for additional information regarding the use of confessions

²¹ article 36(1)

²² article 39

²³ article 39

²⁴ article 39

²⁵ article 39(6)

²⁶ at this stage the suspect is referred to as the accused; article 5

²⁷ article 43

²⁸ article 42(1)

²⁹ article 42(2)

³⁰ article 42(2)

³¹ article 6

Before the trial, both the prosecutor and the accused must file at Court a list of any witnesses and experts they wish to call to give evidence, explaining the relevance of their testimony.³² The Court examines the lists and may exclude any requested witnesses and order the appearance of any other witnesses or experts whose evidence it considers to be potentially relevant,³³ following which the selected witnesses and experts are notified by the Court of their requirement to attend the trial.³⁴

At the subsequent trial before a single Judge the indictment is read out and the legality of the accused's arrest is assessed.³⁵ The prosecutor then presents the case against the accused and explains the findings of the preliminary investigation.³⁶ Police officers who conducted the investigations may give evidence, as well as witnesses and experts, including any victim and they may be cross-examined by the accused or their defence counsel. The accused may also give evidence. At any stage, the Court can question the accused or any witnesses and experts,³⁷ although the accused can refuse to testify and answer the Court's questions.³⁸

At the end of the proceedings the prosecutor may give an indication to the Court of the kind and amount of punishment that he considers the accused should receive for the offence if found guilty,³⁹ and the accused or their representative may make final submissions to rebut the accusations made by the prosecutor.⁴⁰ The Judges presiding over the case then retire to chambers to consider the verdict and, in reaching a decision, they must not rely on any witness or expert evidence contained in the file of the preliminary investigation unless it was repeated during the trial or the accused or his legal representative were present and able to ask questions when the evidence was obtained.⁴¹

Decisions should be declared in Court and should identify the accused, detail the relevant facts of the case, and provide a verdict, citing reasons with reference to the facts of the

³² article 51

³³ article 51

³⁴ article 49

³⁵ article 53 (3)(b)

³⁶ article 53(3)(c)

³⁷ article 53((4)

³⁸ article 53(5)

³⁹ article 58 (1)

⁴⁰ article 58(2)

⁴¹ article 55 (1)

case and the law.⁴² Decisions reached in the primary Court are capable of appeal to the Provincial Court on application within 20 days.⁴³ The grounds for appeal include erroneous application of the law by the judge at first instance, or incorrect definition of the crime, evaluation of the evidence or the imposition of an inappropriate penalty.⁴⁴ There is a further route of appeal to the Supreme Court against the decision of the Court of Appeal on the basis that the law has been wrongly applied or interpreted or the evidence against the defendant was invalid.⁴⁵

The Code also provides criminal justice due process protections and rights for defendants that conform with international expectations and standards and the 2004 Constitution. It establishes a presumption of innocence,⁴⁶ and a right for the accused to remain silent.⁴⁷ It also provides protection for the accused against intimidation and coercion to secure confessions,⁴⁸ and entitles him or her to representation by a defence counsel,⁴⁹ who may review the prosecution file submitted in support of the indictment⁵⁰ and represent the accused during preliminary investigations by the judicial police,⁵¹ at any later interrogations by the prosecutor⁵² and at the trial,⁵³ which the Code stipulates must be heard without undue delay.⁵⁴ The Code also permits defendants to call their own witnesses and experts to give evidence at the trial in order to defeat or discredit prosecution evidence.⁵⁵

Section 4.2 Reasons for the Development of the ICPC

Reviews of Afghanistan's criminal justice system undertaken by the ICJ in 2002 and Amnesty International in 2003 provide some indication of the potential motivating factors behind the passing of the ICPC in 2004.⁵⁶ Both complied with internationally-recognised

⁴² article 61(1)(c)

⁴³ article 63(3)

⁴⁴ article 66(2)

⁴⁵ article 71(1)

⁴⁶ article 4

⁴⁷ article 5(6) ICPC 2004. Article 53 (3) provides a right to remain silent during the trial

⁴⁸ article 5

⁴⁹ article 5(7)

⁵⁰ article 43

⁵¹ article 32(3)

⁵² article 38(1)

⁵³ article 38(2)

⁵⁴ The ICPC does not specify a precise timescale within which trials should be exercised. Article 42(1) states that the court should set a date for the trial 'immediately after having received the act of indictment'. The 2004 Constitution stipulates that the accused has the right 'to be summoned to the court within the time limits determined by law,' article 31(2)

⁵⁵ article's 51(2), 53(3)(f), 55(1)

⁵⁶ Lau, note 72, chapter 3 and Amnesty International, note 120, chapter 1

best practice guidelines for promoting rule of law in states seeking to emerge from conflict, inclined to recommend the prioritisation of determining the nature of existing applicable law and assessing it through the lens of international human rights standards.⁵⁷

The Bonn Agreement had installed a legal system similar to that established by the 1964 Constitution that resulted in applicable substantive and procedural criminal law being governed by the 1976 Penal Code and the 1965 Criminal Procedure Law. Both the ICJ and AI reports, however, revealed significant weaknesses in this formal criminal law framework, some of which related specifically to applicable criminal procedure. ICJ's report concluded that Judges knew little about the procedural laws that were in force⁵⁸ and that 'the laws establishing the framework of criminal procedure [were] marked by uncertainty.'⁵⁹ AI's report noted a lack of sufficient procedures within the 1965 law enabling any challenge to the legality of a detention before a judge, contrary to Afghanistan's international obligations ensuring the provision of fair trial guarantees. There was uncertainty amongst practitioners as to whether detention periods should be determined in accordance with the 1965, 1974 or 1981 laws. Both reports recommended urgent reform of procedural law.⁶⁰

By 2003 there were then, according to these reports, justifiable reasons for introducing a new criminal procedural code. It could provide much needed clarity as to exactly what procedures should be applied in criminal cases thereby replacing the evident uncertainty surrounding applicable law which was perhaps not surprising given the vast number of legal texts still in force and applicable at this time. It could also provide the essential requirements for international standards of fair trial, due process and human rights. At the same time a new law would fulfil the recommendations of international organisations such as the UN that advocated the necessity of adequate criminal law frameworks consisting of modern laws for building effective justice systems in post-intervention states.⁶¹

Section 4.3 The ICPC as a Legal Transplant

By the time Amnesty International's report was published Italy had assumed lead nation responsibility for justice reform as a consequence of its Tokyo-assigned role of leading

⁵⁷ Rausch, note 13, chapter 1, p.42

⁵⁸ Lau, note 56, p.16

⁵⁹ *ibid*, p.23

⁶⁰ The AI report noted that 'the criminal laws should be amended as a matter of urgency,' note 56, para. 7.5; ICJ recommended that existing criminal procedural law needed 'urgent reform,' note 56, p.23

⁶¹ The UN's *Rule of Law*, discussed in chapter 1

international assistance for the reform of Afghanistan's justice sector. The assumption of this role led to the drafting of the ICPC being controlled by Italian experts, a contributing factor in the law becoming a legal transplant, as it resulted in the adoption of provisions from Italy's own 1988 Code of Criminal Procedure.

It is noteworthy that the allocation of Italy's lead-nation role was arguably the result of chance and circumstance rather than the consequence of deliberate intent. By the time the justice sector was considered at the Tokyo Conference international responsibility for other assistance sectors had already been resolved. Consequently Enrico Gerardo De Maio, the Special Envoy to the Ministry of Foreign Affairs to Afghanistan at the time, took it upon himself to nominate Italy as the justice lead nation without prior consultation or authorisation by the Italian Parliament, and arguably without proper consideration of its capacity to fulfil this role.⁶² While it seems extraordinary that such a key area for reform should be led by a country without it having first assessed its own ability and capacity to manage it there was, nevertheless, a lengthy history of association between Italy and Afghanistan to lend justification to De Maio's decision. Italy was one of the founders of the 'Geneva Group' of countries concerned with the political development of Afghanistan.⁶³ Moreover, King Zahir Shah and many high level Afghan luminaries had been living in Italy since 1973 following Daoud's coup and using it as a base from which to generate support, particularly during the Taliban era. Largely as a consequence of this, anti-Taliban Afghan authorities had met in Rome in November 2001 before travelling to Bonn to deliberate on Afghanistan's political and legal future and sign the Bonn Agreement.

In February 2003, Guiseppe Di Gennaro, the Executive Director of UNODC, at the time in his 80's, was appointed 'special advisor' to the Italian government to counsel it in its responsibilities towards justice reform.⁶⁴ The Italian government also established the Italian Justice Project Office (IJPO) with Di Gennaro at its helm and tasked it with overseeing Italian justice reform policies and projects in Afghanistan.⁶⁵ By this stage the ICJ and AI reports had reviewed the criminal justice system and recommended reform of the applicable criminal laws, the latter calling on the MOJ and the Judicial Reform Commission

⁶² interview, former senior Italian government official, 17.07.2008

⁶³ Tondini, M. 'The Role of Italy in Rebuilding the Judicial System in Afghanistan,' (2006) 45(1-2), *Revue de droit Militaire de la Guerre*, 79-118, p. 93. The other founding countries were Germany, Iran and the United States

⁶⁴ Tondini, note 201, chapter 3, p.48. Di Gennaro resigned in July 2004, 5 months after the ICPC was introduced.

⁶⁵ Thier, note 126, chapter 3, p.13

(JRC) to 'facilitate a process of codification of the law' with assistance from the international community.⁶⁶ The JRC convened working groups to review the existing 1965 criminal code. However, there were concerns among international experts that neither it nor the MOJ had sufficiently experienced personnel to be able to conduct any amendment to the law adopting the required internationally acceptable human rights standards.⁶⁷

The IJPO was at this time providing assistance to both the JRC and the justice ministries and it was well placed to assist in the process of reforming Afghanistan's criminal legislation. As the head of the IJPO Di Gennaro assumed control of the process of drafting the ICPC. He was assisted in this respect by a small team of lawyers from the IJPO and by some US military lawyers,⁶⁸ but nevertheless emerged as the principle architect of the law,⁶⁹ which was completed within in a very short period time.⁷⁰ According to an international expert, Di Gennaro claims to have consulted Afghan officials over the content of the law.⁷¹ It is likely however, that there was only a very limited degree of consultation between international personnel and Afghan officials during the drafting process.⁷² Indeed, the lack of consultation created resentment at local level in the Afghan justice institutions and the Afghan National Assembly initially rejected the Code and urged President Karzai to refuse to ratify it.⁷³ It was only after the Italian government exerted political pressure by threatening to withdraw funding for other justice projects that President Karzai invoked his Presidential powers and issued the Code as an interim decree pending parliamentary approval.⁷⁴

Di Gennaro's knowledge of Afghan criminal law and its legal traditions is thought to have been limited in comparison to that of his home country.⁷⁵ A former Italian anti-mafia magistrate, he was a high-profile legal figure in Italy and considered to be an expert in

⁶⁶ Amnesty International, note 56, para 7.5

⁶⁷ *ibid.*, para 7.4.

⁶⁸ USIP, note 125, chapter 1, p.8. See also Tondini, M. 'Rebuilding the System of Justice in Afghanistan: A preliminary Assessment' (2007) Vol 1. No.3 *Journal of Intervention and Statebuilding*, p. 333-354. Tondini states that Di Gennaro was 'assisted by US consultants,' p.343. According to an Italian consultant the law was 'mainly drafted by Di Gennaro,' telephone interview, Italian legal consultant, 17.11.2008

⁶⁹ interview, former senior Italian government official, 17.07.2008

⁷⁰ *ibid.* According to the official 'Di Gennaro literally rolled up his sleeves and drafted it,' 17.07.2008

⁷¹ interview, UK senior prosecution advisor, 25.06.2008

⁷² USIP report, note 68, p. 8; Tondini, note 68, p.343; and Suhrke, note 84, chapter 3, p. 213

⁷³ Afghanistan Watch, *Afghanistan National Laws and International Criminal Court Statute*, (10 December 2009) available at <http://www.watchafghanistan.org/article015.php>

⁷⁴ Suhrke, note 72, p. 213

⁷⁵ interview, former senior Italian government official, 17.07.2008, who stated 'I am sure that his knowledge [of Afghan law] was very limited.'

Italian criminal law and international standards of human rights. This may account for his decision to base the new ICPC on the Italian Criminal Procedure Code 1988, on which he had specialist knowledge and expertise.⁷⁶ Although the ICPC did not emerge as a complete reproduction of the Italian Code, which contains more than 300 provisions, its 98 articles are largely sourced from it.⁷⁷

As a consequence of the processes that led to the drafting of the ICPC and the foreign reference point for its content, it can be construed as a legal transplant. It satisfies the definition of a legal transplant proposed in this paper. It was the product of the act of borrowing selected legal provisions that had been successfully established in another country, in this case those from the Italian Code, so that they would be incorporated directly into Afghanistan's domestic criminal justice system.

Section 4.4 Evaluating the ICPC

4.4.1 The Application of the ICPC

A number of international organisations and NGO's have reported on various areas of the justice system in Afghanistan since 2004, some of which provide useful information regarding the application of the Code.⁷⁸ The Afghan ministries, however, have published very little statistical material providing any valuable insight into the manner in which criminal procedure laid down in the ICPC is being applied. Commenting on this issue, a report by UNODC in May 2008, which reviewed existing criminal justice legislation in connection with a programme of penitentiary reform, lamented that 'essential information, such as crime and sentence statistics nationwide...[were] not available.'⁷⁹

Some statistics have been published by the Afghan ministries and the Central Statistics Organisation (CSO). Information provided by CSO's Statistical Yearbooks indicate that

⁷⁶ See Appendix 5 for additional information regarding the Italian Criminal Procedure Code

⁷⁷ Tondini, note 68. Tondini states that the articles in the ICPC 'reproduce the bulk of the Italian criminal procedure code's provisions,' p.343

⁷⁸ For example, UNDP, note 26, chapter 1; UNAMA, *Overview*, note 154, chapter 2; UNAMA, *Arbitrary Detention in Afghanistan. A Call for Action*, Vol. 1 (January 2009) available at

www.unama.unmissions.org/.../ADVC%20-%20Vol/021%20-%20English.pdf; UNODC, note 135, chapter 2

⁷⁹ UNAMA, *Arbitrary Detention*, *ibid*, p.vii

between 2004 and 2010 'total crimes' on an annual basis varied between 6,786 and 10,870 (Figure 1). Between 2007 and 2010 the most common offences were consistently 'injury,' theft and murder⁸⁰ (Table 3). However, the CSO unhelpfully fails to confirm whether the statistics it provides refer to total number of arrests or convictions; nor does it provide any information regarding sentencing.

The AGO has published only one National Crime Statistics Report since 2001 which covers the period between March 2006 and March 2007 (Table 4).⁸¹ While some caution should be noted as to the accuracy of the figures provided, the report does provide some useful information about the working capacity of the courts, and the number and type of cases that they were processing when applying the ICPC.⁸² It reveals that the Appeal Prosecutors' Office prosecuted 12,365 cases in the courts in the central departments, Kabul and in the provincial courts.⁸³ The most common types of offences prosecuted were theft (19%), murder (12%), assault-related 'beating-up' (10%) and 'injury' offences (7.5%), demonstrating a degree of similarity with the statistics provided by the CSO.⁸⁴

The Supreme Court has also made available some statistics on the judicial decisions reached in criminal cases in central and provincial courts for the period between August 2008 and April 2009 (Table 5). Excluding offences involving narcotics, the Courts considered 416 individual criminal cases. Of these only 2 resulted in the release of suspects. In the remaining cases, 31 defendants were sentenced to be executed and the rest received a total of 4,455 years imprisonment. These figures suggest that if an individual is arrested and charged with an offence there is a high probability that they will

⁸⁰ It is possible that the customary principle of vengeance provides some explanation as to why there is a higher percentage of murder cases; Roder, T. *Provincial Needs Assessment: Criminal Justice in Uruzgan Province* (2010), available at http://www.mpil.de/shared/data/pdf/pna_uruzgan_final_1.pdf, p.14

⁸¹ *The Unified Report of Criminal Cases in Appeal Prosecutors' Office in Centre and Provinces from 22 March 2006-17 March 2007*, available at <http://www.ago.af/CONTENT/Crimstat/NationalCriStat/NationalCrimeStisticsEng.html>

⁸² Dupree describes statistics in Afghanistan as 'wild guesses based on inadequate data,' Dupree, N. *Information Sharing for an Informed Civil Society in Afghanistan*, Anthony Hyman Memorial Lecture (March 2005), available at www.soas.ac.uk/ccac/events/anthonyhyman/file25443.pdf, p.2. An interviewee referred to statistics provided by the Afghans as 'something that we have some difficulties with because it is all paper-based...and people cannot count or do decimal points or things like that so you will see things that look like inconsistencies,' interview, senior member of the UK Rule of Law team 29.02.2008

⁸³ Although there are population differences, this represents just 2% of the total number of cases processed by the CPS in England and Wales during the same period (1,661,605); see the Crown Prosecution Annual Report and Resource Accounts 2007-2008 <http://www.cps.gov.uk/publications/reports/2007/summary.html>

⁸⁴ Unified Report, note 81. It fails to confirm whether the statistics provided refer to criminal arrests or convictions. It is also silent with regard to sentencing

be convicted (99%).⁸⁵ Moreover, if a defendant is not released or executed following criminal proceedings in which the ICPC is applied, on average they are likely to be sentenced to at least 10 years in prison.

The Supreme Court statistics also demonstrate significant regional variations in sentencing decisions. In Saamangan and Takhar provinces individuals convicted of murder were on average sentenced to 20 years imprisonment, whereas in Panjshir province defendants convicted for the same offence were sentenced to an average of only 2 years in prison. Moreover, the percentage of cases in which the Courts sentenced convicted murderers to be executed varied depending in which province the case was heard. In Takhar province 50% of suspects convicted of murder were sentenced to be executed. By comparison, in Jawzjan and Ghanzi provinces 33% of similar offenders received this type of sentence and in Saripul only 14% were to be subjected to a similar fate. More than a quarter of all cases in which defendants were sentenced to death took place in Herat province (8 out of 31). In the remaining 7 provinces which provided sentencing statistics, none of the defendants convicted of murder were sentenced to be executed. The potential for being executed if found guilty of an offence is, it would seem, a provincial lottery and likely to be a consequence of the inconsistent application by justice officials of the ICPC and the Penal Code in the Courts across the country.

The lengthy prison sentences and high conviction rates evident from the Supreme Court statistics correlates with statistics relating to the prison population in Afghanistan which indicate a significant increase in prison numbers during the period that the ICPC has been applied. In 2001 Afghanistan's prisons held only 600 inmates.⁸⁶ In March 2005, a year after the ICPC had been enacted, there were estimated to be 5,500 incarcerated in the country's prisons.⁸⁷ By January 2006 prison numbers had increased to 6,085.⁸⁸ Only nine months later there were reported to be 10,604 prisoners,⁸⁹ almost double the number the previous year and far exceeding the prison capacity at the time of 7,421 inmates.⁹⁰ It is

⁸⁵ This is consistent with a 96% conviction rate for proceedings under the CNL in 2011; telephone interview, senior member of Rule of Law Team, ADIDU, London 31.03.2011

⁸⁶ UNAMA, *Overview*, note 78, p. 21

⁸⁷ *ibid*

⁸⁸ *ibid*

⁸⁹ UNODC, note 78, p.viii

⁹⁰ *ibid*, p.54. Figures provided by the Central Prison Department, 2006. See also UNAMA, *Arbitrary Detention*, note 78 for details of prison population in 2008. This report estimated the prison population in Afghanistan to

estimated that the total number of people being detained in prison now is 17,000 which continues to represent more than the country's total prison capacity amongst its 24 provincial prisons and 200 detention centres.⁹¹ Although the government plans to increase prison capacity to 27,000 with assistance from UNODC and international partners,⁹² current prison facilities remain poor and overcrowding has been reported to be as much as 1000% in some detention centres.⁹³

Since the ICPC has come into force, detention and conviction rates have consistently outstripped prison capacity. While this on the one hand reflects insufficient prison infrastructure it is also indicative of an increase in the number of police arrests leading to a greater number of cases being referred for investigation and prosecution adopting ICPC procedures at a time when the justice ministries are not sufficiently capable of processing them. The expansion of the ANP since 2004 has resulted in increased numbers of arrests. In 2006 42% of all cases referred to the Afghan courts involved criminal law matters.⁹⁴ By 2007 'the number of arrests ha[d] increased,' according to UNAMA,⁹⁵ and 6,156 people were detained under provisional arrest.⁹⁶ By 2009 annual arrests were estimated to number between 8,000 and 10,000.⁹⁷ While more arrests are being made by the police, more criminal cases are being referred to the Courts. According to Amnesty International, the Courts dealt with 5,310 criminal cases between 2002 and 2003, before the ICPC was passed.⁹⁸ AGO reports for 2006 to 2007, however, refer to the AGO prosecutor's office handling 34,288 existing files.⁹⁹ Moreover, the Supreme Court reported a five-fold increase in pending criminal cases in the two-year period between 2005 and 2007.¹⁰⁰

be 'approximately 12,500' in December 2008, p.3; UNODC, note 78, estimated the total number to be in prison as 12,400 in December 2007, p.54; ICRC visited 13,727 detainees in 109 different detention centres across Afghanistan between 2007 and 2008, *ICRC Annual Report 2008* available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-afghanistan/\\$File/icrc_ar_08_afghanistan.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/annual-report-2008-afghanistan/$File/icrc_ar_08_afghanistan.pdf), p.187

⁹¹ Interview with Programme Development Director, Penal Reform International 26.04.2011

⁹² UNODC, note 78, p.55

⁹³ *ibid*, p.54

⁹⁴ Armytage, L. 'Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War,' (2007) 67(1), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 185-210; p.195

⁹⁵ UNAMA, *Overview*, note 78, p.21

⁹⁶ Tondini, note 64, p.70

⁹⁷ Benard et al, note 145, chapter 3, p.164

⁹⁸ AI, note 56

⁹⁹ Statistics available at <http://www.ago.gov.af/CONTENT/AboutAGO/Reports/YearlyR/YearlyRreportEng>

¹⁰⁰ Bassiouni et al, note 98, chapter 3, p.11

The capacity of the justice system to handle the increasing flow of cases referred for investigation and prosecution has, however, been questionable.¹⁰¹ At the time that the ICPC came into force in 2004 a lack of available judicial personnel meant that 9% of the courts and 12% of prosecutor's offices were operated only by administrative staff.¹⁰² Moreover, the administration of the courts was seriously handicapped by a shortage of support staff. The number of administrative personnel working for the judiciary equated to only 60% of the total number of judges and those in prosecutors' offices represented only 23% of the total number of prosecutors.¹⁰³ By the time of the last in-depth analysis of the justice system in 2007 the AGO was reported to have 4,900 employees, 2,500 of whom were prosecutors. However, prosecutors' offices in the provinces were reported to be either 'non-existent or placed in inadequate structures'¹⁰⁴ and an estimated 80 districts had no prosecutors' office at all. These problems have been compounded further by a weak court infrastructure inherited by the Afghan state in the post-Taliban era and by a limited judiciary. In 2007 there were 442 courts across the country, comprised of 34 provincial courts and 408 primary courts.¹⁰⁵ Of these, however, 97.8% required urgent reconstruction or rehabilitation work and 19% were not functioning at all. These limitations adversely affect the reach of the state justice system and the application of state criminal law such as the ICPC.¹⁰⁶

The weak capacity of the judiciary has had similar consequences. In 2007 there were 1,415 judges employed by the Supreme Court to preside in the courts, although CHECCHI reported that in reality only 1,107 were actually working in them, 12% of whom had been appointed before 1978.¹⁰⁷ Adopting these figures there were 21,317 people per judge in Afghanistan and too few to consider the amount of cases awaiting trial. Many of those detained in Afghanistan's prisons were incarcerated simply because there was no judge available to consider their case.¹⁰⁸ In 2007 58% of the inmates were being held in Afghanistan's prisons were being held in pre-trial detention waiting for their case to be

¹⁰¹ UNODC, note 78, p.52

¹⁰² Tondini, note 64, p.70

¹⁰³ *ibid*

¹⁰⁴ Bassiouni et al, note 100, p.10. In 2010 Uruzgan province had only 5 prosecutors, who were working in only 2 of the province's 7 districts. None had a University education; Roder, note 80, p.18

¹⁰⁵ UNDP, note 78, p.71 There has been no in-depth assessment of the status of the justice system since 2007

¹⁰⁶ Bassiouni, note 100, p.26

¹⁰⁷ UNDP, note 78, p.71

¹⁰⁸ *ibid*, p.8. The report also noted regional variations in 'population per judge' figures. For example, in Panjsher province there were 6,800, in Paktika 52,700 and in Kandahar 76,200 people per judge, p.168

adjudicated, a direct consequence of the lack of capacity in the formal justice system to process an increasing number of cases referred for prosecution.¹⁰⁹

The proper application of the ICPC has also been hampered by the poor capacity of the country's defence service. By 2005 there were only 170 lawyers registered with the Bar at the MOJ of whom only 50 were practicing.¹¹⁰ By 2007 their numbers had increased to 250.¹¹¹ There are now reported to be 850 defence lawyers, equating to 30,000 people per defence counsel, only 50 of whom are members of the Afghan Independent Bar Association (AIBA).¹¹² The result is that although the ICPC provides that defendants can be assisted by defence counsel of their choice, in practice there are insufficient numbers available to comply with this provision of the Code.¹¹³

There are, according to UNODC 'huge gaps in the provision of legal defence' in Afghanistan.¹¹⁴ A survey in 2008 reported that 81% of adult male prisoners interviewed did not have legal representation.¹¹⁵ UNAMA reported the following year that 82.5% of 931 detainees had not had a defence lawyer to represent them at any stage of their proceedings.¹¹⁶ In the majority of cases detainees had not been represented due to the unavailability of defence counsel.¹¹⁷ Monitoring conducted by the Women and Children Legal Research Foundation (WCLRF) in 2008 found that 57% of 900 women respondents facing criminal charges presented their cases without representation and that the potential for obtaining representation varied considerably between provinces.¹¹⁸ In some provinces insecurity has contributed to the poor provision of defence representation. Helmand, for example, had no defence lawyers at all until September 2008 when security was considered sufficiently stable for the International Legal Foundation (ILF) to establish an office there.¹¹⁹ By 2010, however, there were only 4 defence lawyers for the whole

¹⁰⁹ Tondini, note 64, p.70

¹¹⁰ UNAMA, *Overview*, note 78, p.5

¹¹¹ UNODC, note 78, p.53

¹¹² Wong, K. *Afghan Corruption Threatens US Strategy, Galbraith Says*, ABC News, 01.04.2010 available at <http://abcnews.go.com/Politics/Afghanistan/afghan-corruption-threatens-us-strategy-galbraith/story?id=10251489&page=2>

¹¹³ ICPC, article 18(3); 2004 Constitution, article 31

¹¹⁴ UNODC, note 78, p.53

¹¹⁵ *ibid*, p.42

¹¹⁶ UNAMA, *Arbitrary Detention*, note 78, p.13

¹¹⁷ *ibid*

¹¹⁸ The higher instances were in Kabul and the lowest in Balkh province. WCLRF 'Women's Access to Justice. Problems and Challenges (2008) available at www.wclrf.org/English/eng_pages/Resources/Women_a_t_Justice/WATJ.pdf, p.22-23

¹¹⁹ Hirst, F. *Support to the Informal Justice Sector in Helmand – April 2009* held on file, p.8

province but they refused to act in cases outside the capital of Lashkar Gah due to security concerns.¹²⁰

In some instances defendants are reportedly denied access to legal representation because they have not been informed of their rights to receive it by legal authorities contrary to the provisions of the Code.¹²¹ A 2007 report observed that 'many judges and prosecutors do not fully recognise or respect the role of defence attorneys'¹²² resulting in ILF defence lawyers being denied access to appear at trial or given little or no notice of trial hearing dates. The same report also referred to incidences where defence lawyers were deliberately obstructed in their ability to defend clients by other professionals involved in the justice system and subjected to criticism and intimidation, included threats to withdraw their licences.¹²³ UNAMA has reported further incidences of defence counsel dropping cases under pressure from other justice officials.¹²⁴ The effective implementation of the sections of the Code that relate to representation by defence counsel is therefore being hampered by inadequacies in the capacity of the defence service and also by the failure of police, prosecutors and Judges to properly apply them. The problems relating to professional application appear to be the result of a deficient culture of criminal defence in the state system manifested by a lack of awareness amongst judges, police and prosecutors of the role of defence lawyers and an inclination for obstructing access to representation.

The apparent lack of regard by some legal professionals for both the role of defence counsel and the provisions of the Code relating to defendant's rights of access to them were highlighted during the prosecution of the case concerning Assadullah Sarwari between 2005 and 2007. One of the grounds cited by the prosecution in the indictment as evidence of Sarwari's guilt in relation to the offence of the 'killing of countless Afghans' was the fact that he had 'interrupted the investigation by asking for a lawyer.'¹²⁵ This was only one of a number of procedural irregularities during the trial which, according to

¹²⁰ Interview, UK Justice Advisor, 24.02.2010; Walker, E.L. *Culturally-Attuned Governance and Justice in Helmand Province, Afghanistan*, International Media Ventures (April 2010) available at <http://www.Governance%20and%20Justice%20in%20Helmand%20-%20WALKER1.pdf>

¹²¹ ICPC, article 5(7); UNAMA, *Arbitrary Detention*, note 78. This was the case with 15.6% of the interviewees, p.13

¹²² UNAMA, *Overview*, note 78, p. 18

¹²³ *ibid*

¹²⁴ UNAMA, *Arbitrary Detention*, note 78, p.13

¹²⁵ UNAMA, *Overview*, note 78, p. 18

UNAMA, included a 'failure to appoint defence counsel.'¹²⁶ In spite of this Sarwari was eventually found guilty at the National Security Primary Court and sentenced to death.

The potential for defendants to obtain legal representation in accordance with the provisions of the ICPC has been restrained not only by the improper application of the Code by legal professionals but also by the inadequate provision across the country of a legal aid scheme to provide legal advice and assistance to individuals facing criminal charges. Article 31 of the 2004 Constitution commits the Afghan government to provide legal aid services. In compliance with this the ICPC entitles defendants to free legal assistance, which should be available under a legal aid scheme.¹²⁷ The legal aid service in Afghanistan is largely dependent on the resources of a number of NGO's, some of which have made considerable contributions towards supporting it.¹²⁸ Defence lawyers from ILF handled 3,275 cases between 2003 and 2007 in which 66% of defendants were released before or shortly after trial and only 12% received prison sentences of more than 1 year.¹²⁹ Moreover, between 2006 and December 2008 the Da Qaanoon Ghush-tonky organisation secured the release of 50% of 4,000 detainees to whom it provided legal assistance and in 80% of the remaining cases defendants received reduced sentences because they were represented with the assistance of legal aid.¹³⁰

These statistics demonstrate a significant correlation between the provision of legal aid and defence representation on the one hand and a reduction in sentencing and conviction rates on the other, illustrating the potential benefit of having a legal aid system accessible to the public that can deliver access to justice. Unfortunately, however, the legal aid service in Afghanistan remains largely inadequate. It is poorly monitored by the Supreme Court and latterly the MOJ and it remains largely misunderstood by the public and legal community.¹³¹ While this remains the case it is likely that defence representation will discriminate against the poor. Of 1350 respondents interviewed by WCLRF in 2008 96% who did not have a defence counsel during criminal proceedings had no income at all.¹³² Until a sustainable legal aid scheme is developed that can ensure access to legal defence

¹²⁶ *ibid*, p. 36

¹²⁷ article 19, ICPC

¹²⁸ UNODC, note 78, p.53; CIDA project running from 2007-2010 available at <http://www.afghanistan.gc.ca/canada-afghanistan/projects-projets/institutions5.aspx>

¹²⁹ Statistics available at <http://www.theilf.org>

¹³⁰ UNODC, note 78, p.53

¹³¹ *ibid*

¹³² WCLRF, note 118, p.17

for all those requiring legal aid the ICPC is likely to be implemented in a discriminatory manner, exacerbating its potential for creating injustices.

The inadequate provision of legal aid together with the poor capacity of the defence service and the insufficient referral of defendants to defence lawyers by legal authorities for representation are likely to be contributing factors to the propensity of judges to convict and hand out lengthy prison sentences when applying the provisions of the ICPC. As Afghanistan's prison population consequently increases, a worrying concern is that many prisoners are detained arbitrarily. Indeed, since the introduction of the ICPC, arbitrary detention has remained a pervasive feature of criminal justice in Afghanistan.

Monitoring of MoI and MoJ detention facilities in 2009 revealed that a range of judicial and legal authorities including the police, prosecutors, the Courts and detention centre officials arbitrarily detained people across Afghanistan 'with disturbing regularity at the district, provincial and central levels.'¹³³ A Foreign Office prosecution caseworker based in Helmand province and interviewed in December 2008 confirmed for this research that many arrested individuals were arbitrarily detained under the ICPC. Approximately 90% of 300 defendants imprisoned were waiting for a trial date and some had been waiting for more than three years.¹³⁴ Amnesty International reported 'widespread' arbitrary arrest and detention of individuals by the police in 2009¹³⁵ and a report by UNAMA the same year concluded that 'detention centres are overcrowded with a significant number of persons whose detentions do not appear to be justifiable as lawful, reasonable or necessary, particularly in the pre-trial phase.'¹³⁶

It is possible to lay some of the blame for this worrying trend at the feet of the transplanted content of the Code itself. Omissions and its lack of clarity and prescription, particularly at the pre-trial stage of proceedings, have increased the risk of defendants being arbitrarily detained following arrest. The Code stipulates that a prosecutor may release a detained individual before trial whenever they determine that the deprivation of the individual's

¹³³ UNAMA, *Arbitrary Detention*, note 78, p.1-2

¹³⁴ Telephone interview, PRT Justice Adviser, Helmand province, 12 December 2008; Walker claims that in Helmand 'on average, a criminal case may take three years, even though constitutionally the maximum length should be 9 months, whereas resolution by tribal elder *shuras* may be a week and Taliban justice may be decided in a day;' note 125, p.55

¹³⁵ *Amnesty International Report* (2009) available at <http://report2009.amnesty.org/>, p.56

¹³⁶ UNAMA, *Arbitrary Detention*, note 78, p.12

liberty is no longer necessary.¹³⁷ Nevertheless, it fails to specify with any clarity when an individual must be released.¹³⁸ Moreover, while the Code states that the prosecutor should conduct interrogations within 48 hours of arrest¹³⁹ there are no guidelines addressing what happens if this does not occur or whether a detainee should be released from custody at this point if no interrogation has taken place. In addition, following the 48-hour interrogation period the ICPC stipulates that the prosecutor should release an individual within 15 days of arrest, unless a further 15-day extension has been granted on application to the Court or an indictment has been filed.¹⁴⁰ However, after the filing of an indictment, there is no provision in the Code setting out a precise time frame within which a trial should begin.¹⁴¹

The Code also omits any requirement for review by the Court of the legality of any arrest and detention at the pre-trial stage until the first hearing,¹⁴² scheduled to take place within 15 days of arrest.¹⁴³ Furthermore, it lacks any prescriptive guidelines on how the legality of detention should be determined at the first hearing. It also fails to stipulate the nature of any legal test that the Court should apply to assess legality and it omits to provide any explicit right to the detainee to be present during the determination of the legality of their detention either when the prosecutor confirms the actions of the police within 72 hours of arrest or when the matter is first considered by the Court. Similarly, it declines to formally permit the presence of defence lawyers at these times to enable them to challenge the decisions of the prosecutor and the Court.¹⁴⁴ All of these omissions increase the potential for arrested individuals to be detained arbitrarily for long periods at the pre-trial stage.

In addition to these concerns, the ICPC has attracted criticism for failing to provide sufficient pre-trial alternatives to imprisonment.¹⁴⁵ It contains no provisions at all specifying when an individual can be released on bail.¹⁴⁶ Judges are instead expected to refer to the

¹³⁷ article 34(2) ICPC

¹³⁸ Unlike the 1965 Criminal Procedure Law which stipulated that the pre-trial detention should not exceed nine months (article 87)

¹³⁹ article's 34(2) and 35(2)

¹⁴⁰ article 36

¹⁴¹ IDLO, 'Criminal Law and Procedure in Afghanistan: Focus on Gender Issues,' (2007) available at www.idlo.int, p.42

¹⁴² article 53(3)(b)

¹⁴³ article 36

¹⁴⁴ There is nothing in articles 33, 36 and 38 of the ICPC that specifically provides that either the defendant or their counsel is entitled to be present when pre-trial detention is reviewed by the prosecutor and the Court

¹⁴⁵ UNODC, note 78, p.viii

¹⁴⁶ IDLO, *Focus on Gender Issues*, note 141, p.42

1965 Criminal Procedure Code for guidance on this issue.¹⁴⁷ The Code also fails to assign authority to the police to divert suspects from the criminal justice system. Moreover, although it entitles prosecutors to discharge cases, it does not enable them to refer defendants to diversion facilities such as restorative justice or treatment programmes.¹⁴⁸

It is likely that insufficient procedural guidelines in the Code relating to detention increase the potential for defendant's to be arbitrarily detained during the course of criminal proceedings. In practice, however, the prevalence of arbitrary detention as a feature of formal criminal justice in Afghanistan post-2004 is compounded not only by the inadequacies of the Code but also by a failure by legal authorities to properly apply its provisions. The poor and limited application of the procedures relating to the right to defence counsel by prosecutors and judges has already been noted. Evidence suggests that legal authorities also rarely adhere to the detention timeframes that the Code does provide.¹⁴⁹ A report by UNAMA in 2009 noted a 'frequent failure of police and prosecutors to respect existing time limits and procedures to control the legality of detention.'¹⁵⁰ It also commented that 'a significant number of detainees were in detention awaiting court verdicts well beyond legal timeframes laid out in the ICPC.'¹⁵¹ The two-month timeframe at the Primary Court level for verdicts to be reached was breached in all of the detention cases monitored by UNAMA in six of Afghanistan's provinces, including Kabul. Delays at the Supreme Court level, where verdicts should, according to the Code,¹⁵² be reached within 5 months, 'often stretched into years.'¹⁵³ Some detainees had waited for more than 6 years for the Supreme Court to reach a verdict.¹⁵⁴ A number remained incarcerated in spite of being acquitted of the charges against them and even after they had served their sentences.¹⁵⁵ The study observed that 'throughout Afghanistan, MoJ detention centre authorities did not necessarily release prisoners who had completed their legally mandated sentence.'¹⁵⁶ The same UNAMA report also found that provisions in the Code allowing for

¹⁴⁷ Judges and prosecutors apply the bail provisions of the 1965 CPC, amended in 1974, as they do not contradict any of the provisions of the ICPC; see UNAMA, *Overview*, note 78, p. 6; UNODC, note 78, p.13

¹⁴⁸ UNODC, note 78, p.viii

¹⁴⁹ UNAMA, *Overview*, note 78, p. 6

¹⁵⁰ UNAMA, *Arbitrary Detention*, note 78, p.12

¹⁵¹ *ibid*

¹⁵² article 6(2) ICPC

¹⁵³ UNAMA, *Arbitrary Detention*, note 78, p.12

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*, p.12-13

¹⁵⁶ *ibid*, p.13

the suspension of sentences were not being properly applied.¹⁵⁷ UNODC has speculated that in reality suspensions are only granted in cases involving corruption.¹⁵⁸

The improper or incomplete application of the ICPC by legal authorities is not confined to procedures relating to detention timeframes. Nor is it limited to any particular section of the legal community who should be applying it. Instead, it is evident in relation to all of the procedures detailed in the Code from investigation to imprisonment and it is ubiquitous among the whole spectrum of state criminal justice actors including the police, prosecutors, judges and defence lawyers. This has been the case since the Code was introduced and continues to be the case. AI reported in 2005 that judges and prosecutors were often ignorant of applicable state law, such as the ICPC.¹⁵⁹ A senior UNAMA rule of law officer interviewed in 2007 as part of this research who observed criminal trials in Herat province noted the very limited ability of Judges to conduct even simple cases involving basic theft and that trial procedures prescribed by the Code were not applied.¹⁶⁰ UNAMA reported in April 2007 that the 'procedures relating to the investigation, arrest and detention, charging, trial and imprisonment of individuals are rarely adhered to.'¹⁶¹ A Provincial Reconstruction Team (PRT) Justice Adviser interviewed in December 2008 remarked that 'most of the Judges and prosecutors know the basics [of the ICPC] but choose to ignore it.'¹⁶²

The question remains, however, that if legal professionals are not necessarily properly applying the provisions of the Code when deciding on procedural matters in connection with criminal cases, what are they applying? To some extent they are relying on nothing more than their own personal intuition. After spending more than a year observing criminal trials in Kabul, a Prosecutions Caseworker Adviser confirmed in 2009 that Judges were conducting trials not in accordance with the provisions of the Code but 'the way that they think it should be done.'¹⁶³ These practices still continue. Tondini noted in 2010 that in the criminal courts 'rulings were (and still are) largely based on the Judge's personal

¹⁵⁷ Sentences can be suspended when an offender is suffering from a physical or mental illness, is pregnant or responsible for the care of a child under 15 (article 89)

¹⁵⁸ UNODC, note 78, p. 16

¹⁵⁹ *Amnesty International*, note 230, chapter 3, p.36

¹⁶⁰ interview, senior Rule of Law officer, UNAMA 17.10.2007.

¹⁶¹ UNAMA *Overview*, note 78, p. 6

¹⁶² Telephone interview, PRT Justice Adviser, Helmand province, 12.12.2008

¹⁶³ interview, Prosecutions Casework Adviser 06.02.2009

opinion.’¹⁶⁴ In addition, aside from relying on intuition, legal officials also adhere to customary and Islamic approaches to justice over and above the prescriptive procedures of the ICPC. UNAMA has reported that ‘in adjudicating criminal cases, judges are discretionally applying a mixture of *shari’a* law, Afghan customary law and statutory law.’¹⁶⁵ By way of example, according to one report, the former Chief Judge of Helmand province, Judge Afghani, issued four orders for *quisas* executions over a five year period to 2008 ‘based upon his interpretation of *Shari’a* and evidence principles.’¹⁶⁶

The incursion of *Shari’a* law into the application of criminal procedure is particularly evident in cases concerning ‘moral crimes.’ Prosecutors and judges are reportedly detaining individuals under the provisions of the ICPC for offences that are established under customary or Islamic law but not recognised under any Afghan state law. In December 2008 UNODC found that approximately 50% of detained women were facing criminal proceedings for breaching ‘moral crimes’, customary law or *Shari’a*.¹⁶⁷ WCLRF reported the same year that ‘a significant number of detained women have been accused of running away from home’¹⁶⁸ and the ILF assisted in 212 ‘escape from home’ cases between 2003-2010 in spite of the fact that it is not a criminal offence.¹⁶⁹

A number of well-publicised criminal cases which attracted international attention illustrate the pervasive influence of *Shari’a* on criminal justice and a tendency by legal actors, and particularly the judiciary, towards casting aside procedures laid down in the ICPC in order to comply with Islamic interpretations of justice. In 2005 Ali Mohaqiq Nasab was arrested at the request of the Supreme Court and charged with blasphemy having published articles in which he questioned the severity of corporal punishments under *Shari’a* and argued that Islamic law discriminated against women. Even though Nasab’s arrest was conducted in a manner contrary to the provisions of the ICPC and his trial was procedurally flawed he was sentenced to two years imprisonment.¹⁷⁰

¹⁶⁴ Tondini, note 64, p.68

¹⁶⁵ UNAMA, *Overview*, note 78, p. 7

¹⁶⁶ Hirst, note 119, p.4

¹⁶⁷ UNODC, *Implementing Alternatives*, note 78, p. 6

¹⁶⁸ WCLRF, note 118. This does not constitute an offence under the Penal Code or any other state legislation; p.19, a fact which, according to Roder, ‘seems to be unknown to most police officers’ in Uruzgan province in 2010; Roder, note 80, p. 13

¹⁶⁹ ILF, *ILF-Afghanistan Case Types*, available at www.theilf.org/class/case_types2.php. See also Table 3.

¹⁷⁰ UNAMA *Overview*, note 78, p.36; Suhrke, note 72, p.223

With reference again to the case involving Assadullah Sarwari, by the time of his trial he had already spent more than 13 years in detention. Although found not guilty of any of the counts detailed on his indictment, the Court invoked *Hanafi* jurisprudence to find Sarwari guilty of an alternative offence in spite of the fact that the prosecution failed, according to international observers, to adduce sufficiently cogent evidence to prove that he was guilty of the charge he faced.¹⁷¹ International monitoring of his trial noted significant non-compliance with the provisions of the Code, particularly those guaranteeing due process and fair trial standards. In addition to the denial of defence counsel, previously noted, procedural rules in relation to the admission of evidence and the cross-examining and calling of witnesses were ignored.¹⁷²

In 2008 Sayed Pervez Kambaksh was found guilty of blasphemy and sentenced to death for circulating an essay on women's rights which questioned verses in the Qu'ran. His trial, however, was held in secret without access to a defence lawyer.¹⁷³ At an appeal hearing the key prosecution witness withdrew his testimony, claiming that he had been forced to lie on pain of death. Nevertheless, rather than being acquitted of the charges against him, Kambaksh's sentence was only commuted to 20 years imprisonment. When the matter was referred for further appeal in March 2009, in spite of assurances that the hearing would be held in 'a very open court', the Supreme Court upheld the sentence, issuing their decision in secret without permitting any representations by Kambaksh's defence lawyer.¹⁷⁴

These cases raise concerns that Judges are inclined to apply procedural rules that conform with Islamic interpretations of criminal justice at the expense of ignoring procedures laid down in the ICPC. This seems to particularly be the case with regard to crimes involving alleged violations of *Shari'a*. They also underline the limited regard that criminal justice actors appear to have for the procedures outlined in the Code. It does not appear to be critically important to justice officials whether or not they should adhere to it. Indeed, according to a CJTF Judge the ICPC 'is not considered that important' in spite of the fact that it is one of the main procedural codes for prosecuting offences involving

¹⁷¹ UNAMA *Overview*, note 78, p.36-37. Article 130 of the Constitution provides that 'if there is no provision in the Constitution or other laws about a case, the courts shall in pursuance of Hanafi jurisprudence and within the limits set by the Constitution, rule in a way that attains justice in the best manner.'

¹⁷² *ibid*

¹⁷³ Starkey, J. 'Twenty Years in Hell,' *The Independent*, 12.03.09

¹⁷⁴ *ibid*

narcotics.¹⁷⁵ The same Judge verified and that he had ‘not had to read the ICPC for the past three years’ and that in his view ‘it has little use or relevance.’¹⁷⁶ Another Prosecutions Caseworker Adviser interviewed in 2009 observed that he could not ‘find any particular evidence that [the ICPC] is consciously used’ in the Courts.¹⁷⁷

These findings would appear to confirm that improper application or lack of application of the ICPC by justice officials is symptomatic of their having received insufficient training. The CJTF Judge confirmed that the police ‘are still very ignorant’ and do not follow the provisions of the Code, indicating a lack of knowledge of and training in the application of the ICPC’s procedures. The same Judge stated that in his experience ‘many of the lawyers do not have proper training to use any laws’¹⁷⁸ and that ‘there is not enough training anywhere in the legal system.’¹⁷⁹ He further explained that practitioners did not always adhere to the provisions of the ICPC when applicable ‘because they are unaware of them,’¹⁸⁰ a further indication of insufficient legal training.

A lack of background education in state law amongst justice officials in Afghanistan is likely to be contributing to the leaning towards criminal justice procedure and decision-making based on both *Shari’a* and intuition. In 2007 only 11.6% of Judges had obtained a University degree in law.¹⁸¹ A further 7.7% had no legal educational experience at all¹⁸² and 15% were estimated to be illiterate.¹⁸³ The composition of the judiciary reflected a range of ability and competence resulting from diverse appointment practices during different regimes. Some 12% had been appointed before the civil war, 24% were appointed during the communist and *mujahdeen* periods and 12% during Taliban rule.¹⁸⁴ At the same time, the majority of the country’s 2,500 prosecutors had neither a University degree in state law or Islamic law. Only 37% of the 282 prosecutors in the AGO’s provincial office in Kabul and 20% of those in other AGO provincial offices had graduated with University degrees.¹⁸⁵

¹⁷⁵ CJTF Judge, 22.03.2009

¹⁷⁶ *ibid*

¹⁷⁷ interview, Prosecutions Casework Adviser, 06.02.2009

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*

¹⁸¹ UNDP, note 78, p.70

¹⁸² *ibid*,

¹⁸³ Armytage, note 94, p.192

¹⁸⁴ *ibid*, p.188-189

¹⁸⁵ Tondini, note 64, p.70

Inadequate resources are also likely to be contributing to the poor application of the ICPC. In 2007 more than a third of Judges were assessed as having insufficient access to applicable laws and regulations and more than half of them had no access at all to any legal sources, including the ICPC.¹⁸⁶ An additional report in 2007 confirmed a deficiency in legal resources, observing a 'lack of statutory compilations and other legal materials in the courts. No courts hold a full collection of the law and most primary instance courts have only copies of the criminal code (Penal Code) and the traffic law.'¹⁸⁷ A 2009 report noted that 'the judiciary is in dire need of access to legal research materials, updated laws, and important judicial opinions. Without access to up-to-date written materials, judges are forced to rely on old laws (if available) or simply on their own good judgement.'¹⁸⁸

Corruption is also undoubtedly a factor which impacts negatively on the proper and appropriate application of the ICPC, affecting the impartiality of the police, prosecutors and the judiciary. Corruption has been a persistent feature of the application of state criminal justice since the ICPC was introduced. In 2007 considerable numbers of judges were reported to be appointed as a result of patronage rather than ability and the judiciary was 'perceived as the most corrupt institution within Afghanistan.'¹⁸⁹ According to a UK senior prosecutions advisor interviewed in June 2008 'corruption is a huge variable in the application of criminal procedure' and one which hamstrings the whole justice system.¹⁹⁰ A 2008 report by UNODC found that the prevalence of corruption presented 'a very serious obstacle to fair trials, legal detention and imprisonment.'¹⁹¹ In 2009 Amnesty International warned of continued widespread corruption amongst judges, prosecutors and other justice sector officials.¹⁹² Poor working conditions and a lack of personal security adversely affect judicial impartiality and the low wages they receive encourage reliance on bribes to supplement their income.¹⁹³

¹⁸⁶ UNDP, note 78, p.71

¹⁸⁷ UNODC, *Crime Prevention and Criminal Justice Programme*, paper provided at the Conference on the Rule of Law in Afghanistan, Rome (2007), held on file, p.1-37, p.7

¹⁸⁸ Benard et al, note 97, p.164-165

¹⁸⁹ UNDP, note 78, p.72

¹⁹⁰ interview, UK senior prosecutions adviser, 25.06.2008

¹⁹¹ UNODC, note 78, p.xii

¹⁹² AI, note 135, p.55-58

¹⁹³ UNDP, note 78, p.72

Since its inception it would appear that the application of the ICPC has been problematic.¹⁹⁴ While the number of arrests and criminal cases referred to the Courts has increased significantly between 2004 and 2010, available statistics reveal a propensity to convict and hand down lengthy prison sentences, resulting in an increasing prison population, consistently outstripped the prison capacity. Many defendants are detained arbitrarily. To some extent this is the result of the transplanted content of the ICPC and its omissions and inadequacies. It fails to provide clarity over the timeframes for pre-trial detention, or to allow for pre-trial review of the legality of detentions. It also contains insufficient pre-trial alternatives to imprisonment. However, it is also the result of a failure by legal authorities to properly implement its provisions. Many of the Code's procedures are not adhered to and its application is compromised by various 'environmental' factors, including the weak capacity of the judiciary, the unavailability of defence representation, an inadequate legal aid service, poor resources and the prevalence of corruption. It is possible, however, that it is also being compromised by a critical failure by both the local population and legal practitioners to find it sufficiently meaningful and appropriate for application in relation to domestic criminal justice disputes.

4.4.2 The extent to which the ICPC is considered meaningful and appropriate

It has been previously noted in chapter 3 that the established legal order as regards criminal procedure in Afghanistan is conditioned not only by codified state law but also by customary and Islamic approaches to justice. These latter two approaches have always held a greater appeal to the majority of the population, resonating strongly with their tribal allegiances and religious convictions. Those introduced by the centralised state appeal to and affect a minority of the population, a legacy of reservations over the legitimacy of state mechanisms and institutions and the inability of the state to extend the reach of its rule and justice system beyond urban areas. Historically, secular criminal law has always struggled to be regarded as meaningful and appropriate amongst Afghanistan's Islamic and tribal population and this is likely to remain the case until the reach, legitimacy and appeal of the state justice system is improved. The extent to which any new state criminal law, such as the ICPC, is capable of being regarded as meaningful and appropriate in Afghanistan and of being successfully received will be conditioned by these historical and contemporary criminal justice realities.

¹⁹⁴ It was described by UNAMA in 2007 as 'highly problematic;' UNAMA, *Overview*, note 78, p.6

What, however, of the potential at first instance of the ICPC being regarded as meaningful and appropriate by that section of the Afghan population affected by state criminal justice and by the legal officials responsible for applying it? If, after all, it resonates with this section of the population it is more likely to be accepted, to extend its influence to a larger percentage of the population and to result in a successfully received legal transplant. Its potential in this respect is tied to the degree of its compatibility with established state criminal justice procedures that pre-dated it. If there is some correlation between the procedures and rules in the ICPC and those in previous state procedural law it should render the new provisions more meaningful and appropriate to legal practitioners who are applying it. The greater the compatibility with previous norms, the greater the prospects of their being regarded as meaningful and appropriate.

In defence of law reformers drafting new laws to reconstruct the criminal law framework, the real problem in this respect is the historically transformative nature of Afghanistan's state justice system. It has been noted in chapter 3 that since the early 20th century, state criminal procedure has not been a static entity but has been subjected to continuous modification and change, varying in tune with the philosophies of the various political regimes in power. Royal rulers sought to balance western ideals with Islamic principles, Soviet-inspired criminal procedure led to the adoption of a civil law approach, while the Taliban regime chose to align criminal procedure with their radical interpretations of Islamic justice. With which one of these variations should a new criminal code seek to be compatible to improve its prospects of being meaningful and appropriate at least to the legal practitioners who would be applying it? Di Gennaro's ICPC provides a system of criminal procedure that combines both common law and civil law approaches to criminal justice in a manner similar to the 'mixed' system of criminal procedure established in Italy by its 1988 Code. Were the provisions of this new Italian-inspired ICPC, however, sufficiently compatible with any of the past variations of Afghan state criminal law procedure to the extent that they could hope to be in any way meaningful and appropriate to legal practitioners at first instance?

The preliminary investigation stage contains some features of criminal procedure closely associated with systems based on civil law traditions. Charges are issued in private and confirmed in writing and are immune from appeal. Trials, on the other hand, while juryless,

are conducted publicly before a judge and retain rules of evidence similar to trial procedure practiced in common law jurisdictions.¹⁹⁵ This collaboration of civil law and common law procedures, borrowed from Italy, is not too far removed from previous experience with regard to State criminal procedure legislation in that the ICPC's predecessor, the 1965 CPC, had installed a similarly mixed system of criminal procedure.¹⁹⁶ At the time of its introduction the ICPC therefore conformed with an established state law legal tradition that had been in existence for nearly 40 years.

The ICPC is also compatible with other fundamental sources of state criminal law at the time of its introduction, namely the 1976 Penal Code and the 2004 Constitution. It was, according to Tondini, aimed at 'integrating the new procedural norms with the substantive provisions of the 1976 Penal Code, still in force.'¹⁹⁷ Furthermore, it complies with the expectations and requirements for criminal procedure and justice set down in articles 22 to 31 of the 2004 Constitution which guarantee internationally recognised principles of fair trial standards and access to justice.¹⁹⁸ Fundamentally, it is consistent with the overall vision of the 2004 Constitution to establish rule of law in Afghanistan and ensure the fundamental rights and freedoms of its citizens. Its compatibility with the Constitution and the Penal Code should enhance its potential for being regarded as meaningful and appropriate to the legal professionals who would be applying it.¹⁹⁹

There is evidence, however, that, on the contrary, some of the transplanted content of the ICPC has been regarded by justice officials as confusing and inappropriate, adversely affecting its successful application and reception. Its provisions relating to responsibility for criminal investigations represent an example. The 2004 Constitution confirmed that the police would be responsible for the detection of crimes and that investigations and prosecutions would be conducted by prosecutors at the AGO. The ICPC confirmed that the police's role would be confined to detecting crimes but went further than the

¹⁹⁵ article 52 ICPC

¹⁹⁶ Gholami, note 153, chapter 3, p.162

¹⁹⁷ Tondini, note 64, p.94

¹⁹⁸ It is consistent with key provisions of the Constitution. For example the ICPC's prohibition of torture and the exertion of physical and psychological pressure on suspects and accused individuals in article 5 is consistent with article 30(1) of the Constitution which disallows evidence obtained by compulsion. Furthermore, the principle of presumption of innocence is confirmed in both article 4 of the ICPC and article 25 of the Constitution. In addition, Article 19 of the ICPC entitles defendants to free legal assistance and complements article 31 of the 2004 Constitution, which commits the Afghan government to provide legal aid services.

¹⁹⁹ Tondini, note 64, p. 64

Constitution²⁰⁰ and insisted that they should be placed under the 'direction and supervision' of prosecutors and it provided authority for prosecutors to direct the police during investigations.²⁰¹

The strengthening of the role of the prosecutor by the ICPC at the expense of the police marked a departure from established state criminal justice practices in Afghanistan. Historically, the police had always assumed responsibility for both the discovery and the investigation of criminal offences.²⁰² The new procedural roles prescribed by the Code were out of tune with the normal cultural interpretations of the responsibilities of the police and prosecutors. This created confusion as to the general ambit of their duties and a level of mistrust between them.²⁰³ According to an Italian legal consultant 'one of the key reasons why the ICPC is not effectively and equally applied and enforced by judicial actors and enforcement agencies is because 'the division of powers between the police and the prosecutor is still open to doubt.'²⁰⁴ While the provisions were undoubtedly designed to engender a relationship of collaboration and co-operation between police and prosecutors, evidence suggests that in fact they increased tension between them as the police resented the intrusion of prosecutors into their normal investigative role. A UK senior prosecution adviser interviewed in 2008 confirmed that there was 'immense distrust' between the police and prosecutors underscoring the application of the ICPC and intensified by its provisions that enhance prosecutor's roles at the expense of the police.²⁰⁵

The failure of the Code to explicitly replace previous criminal legislation has also caused confusion for legal practitioners trying to apply it. By virtue of article 98(3) it revokes only those laws and decrees which are deemed to be incompatible with it. It is therefore left as a matter for judicial interpretation as to what these might be so that in practical terms, judges are required to subjectively evaluate the validity and applicability of the Code's provisions, judged against former procedural criminal law. As a consequence Afghan

²⁰⁰ Article 134, which provides that 'the discovery of crimes is the duty of the police, and investigation and prosecution are conducted by the Attorney General's office in accordance with provisions of the law.'

²⁰¹ ICPC, article's 23, 29(1) and 29(2). This is similar to the procedure set down in the Italian Code of Criminal Procedure 1988 which stipulates that investigations should be undertaken by the prosecutor who could supervise and direct the police (article 370, para.1); Montana, R. 'Paradigms of Judicial Supervision and Co-Ordination between Police and Prosecutors: The Italian Case in a Comparative Perspective' (2009) 17, *European Journal of Crime, Criminal Law and Criminal Justice*, 309-333, p.315-316

²⁰² Wilder, note 223, chapter 3, p. 50

²⁰³ *ibid*

²⁰⁴ Italian legal consultant, 17.11.2008

²⁰⁵ interview, UK senior prosecution adviser, 25.06.2008

Judges have continued to refer to and apply provisions from the 1965 Criminal Procedure Code. Indeed, because the ICPC omits to address all procedural issues, such as the possibility of granting bail, Judges are required to refer to earlier codes.

The ICPC's failure to emphatically replace previous procedural law has resulted in unsatisfactory confusion for practitioners over the precise nature of applicable law. The consequent uncertainty over what rules to apply increases the risk of varied and inconsistent application of the ICPC's procedural rules. At the same time it compromises the prospects of the law being regarded as meaningful and appropriate among the legal actors who should be applying it. If the meaning of certain provisions and procedures of the law are lost to practitioners due to confusion over their relevance, they are less likely to be regarded as appropriate for the circumstances they face and therefore to be applied. As a result they are more likely to refer to other, less confusing laws instead. There is evidence that this is what is happening in practice. The CJTF Judge interviewed for this research confirmed that legal actors continue to refer to previous procedural laws as opposed to the ICPC. He noted that 'arrests are carried out using the old Penal Code' and that generally in his experience, 'far more attention is paid to the Code that we learnt when we became judges,' referring to the 1965 Code, which was, in his view, 'perfectly good.'²⁰⁶ It is notable also that UNAMA reported in 2007 that 'a significant number of Afghan prosecutors and judges, as well as Afghan NGO defence lawyers have expressed dissatisfaction with the ICPC,' adding that 'the lack of a harmonised and more comprehensive criminal procedure code has created conflict and confusion.'²⁰⁷ This confusion is translating into dissatisfaction about the Code amongst the practitioners who should be applying it, with the result that they are not applying it either properly or at all.

In addition to these problems, the extent to which legal actors regard the ICPC as inappropriate for Afghan criminal justice is reflected in their continuing discretionary application of customary law and *Shari'a* in criminal cases as opposed to the procedures that the Code prescribes.²⁰⁸ This deference to customary law principles and *Shari'a* at the expense of the provisions of the ICPC is in all probability compounded by the educational background of the Judges who are applying the law. State law in the form of the codified ICPC is generally averse to the legal educational background of most practicing Judges.

²⁰⁶ CJTF Judge, 22.03.2009

²⁰⁷ UNAMA, *Overview*, note 78, p.7

²⁰⁸ UNODC, note 187, p.7

The majority of Judges in 2007 were educated in Islamic law; 44% had obtained degrees in Islamic law and 16.1% had been educated in *madrassas*.²⁰⁹ Continuing professional development and education should improve judicial understanding of the application of the ICPC. However, this may take longer to achieve than might have been the case if all Judges were required to be educated to at least tertiary level in state law, including criminal procedural law. As it is, it remains the case that there is no requirement for Judges to have obtained University qualifications from the law faculty at Kabul University.²¹⁰ Moreover, in spite of the training that has so far been provided to Afghanistan's criminal judges they still appear to struggle to find the law meaningful and appropriate for application. ARoLP claimed to have provided training to 70% of all Judges by June 2008,²¹¹ yet the cases involving Nasab, Sarwari and Kambaksh demonstrate that Judges continue to ignore procedural rules set down in the Code in order to mete out justice more aligned to Islamic law.

As such the ICPC does not contain any provisions which specifically draw on procedural rules from either of Afghanistan's customary or Islamic legal traditions. Some of its provisions are, nevertheless, certainly consistent with *Shari'a*. The principle of presumption of innocence, provided for in article 4 of the ICPC, is confirmed in the Qur'an, which states 'remove punishment as often as you can; and set the accused free if he has a chance, because it is better for the judge to be wrong in acquittal than to be wrong in punishment.'²¹² There are no principles in Islamic law in opposition to the ICPC's provision in article 52 for the public conduct of a trial and the jury-less trial system prescribed by the Code is consistent with the Islamic legal system.²¹³ Furthermore, the right of the suspect and an accused individual to remain silent under article 5 of the ICPC is consistent with Islamic law which affords the accused a right to refuse questioning and remain silent during the investigation of *hudud* crimes. In addition, there is no prohibition in the *Shari'a* of the right to legal representation, which is guaranteed in articles 5, 18, 19, 38 and 41 of the ICPC. Islamic law also acknowledges a right to a fair trial without undue delay and

²⁰⁹ UNDP, note 78, p.70. Roder reported in 2010 that none of the Judges in Uruzgan province (population of between 350-400,000) had had a formal University education. All of them had studied Islamic law at *madrassas*, note 80, p.16

²¹⁰ Armytage, note 94, p.190-192

²¹¹ USAID Afghanistan, *Justice Sector Development Program (JSD)*, Kabul: Solicitation No. 306-08-024, 26 June 2008, available at http://www.fbo.gov/download/c59/c599fda28d49cf912080a39ce6d94561/FINAL_RFP-ISUUED_June_26_2008.doc, p.9

²¹² Max Planck, note 170, chapter 3, p. 5-104

²¹³ Etling, note 38, chapter 2, p.11

although this is not explicitly provided for in either the ICPC or the Constitution, the ICPC specifies detention periods for compliance by the police and prosecutors in article 36.²¹⁴ It is also subject to the repugnancy principle in article 3 of the Constitution which affirms that no law can be contrary to the beliefs and provisions of Islamic religion. As *Shari'a* is constitutionally confirmed as the basis of all law, essentially the ICPC cannot contravene it. To that extent the ICPC is not completely divorced from the influences of Islamic law.

In spite of this, the procedures prescribed by the Code are in many respects at odds with the Islamic model of criminal justice. It provides processes for obtaining evidence borrowed from Italy which are distinct from Islamic rules of evidence which are traditionally based on oral testimony and confessions.²¹⁵ More generally, the westernised procedural system encapsulated in the ICPC that favours objective judicial analysis of prescriptive legislative rules contrasts with the Islamic model of criminal jurisprudence which centres on the endeavour of a judge to reach decisions based upon their subjective interpretation of religious sources.

With regard to customary law the ICPC had to conform with constitutional principles and the Constitution does not provide for any referral to customary law and procedure in criminal cases.²¹⁶ It affirms instead that no one can be convicted of a criminal offence unless the act is defined in law as a crime.²¹⁷ As a result, as Deladda points out, the role of *jirgas* in criminal cases 'is definitely contra Constitution.'²¹⁸ Furthermore, the absence of any provision in either in the Constitution or the ICPC that would result in the legitimisation of local justice mechanisms with respect to criminal law has been supported by a number of organisations, notably the AIHRC, which have been strongly opposed to any such move due to the patriarchal nature of the *jirga/shura* institutions and the continued practice of dispensing justice that allows for *baad* decisions.²¹⁹ Therefore, arguably, there were justifiable reasons for the exclusion of local justice procedures from the Code.

²¹⁴ Max Planck, note 212

²¹⁵ Tondini, note 64, p.64

²¹⁶ The only reference to Afghanistan's 'traditions' in the ICPC is in article 54 which is concerned with family welfare

²¹⁷ article 27 ICPC. This principle is also recognised in the Penal Code (article 2) which states that 'no act is defined as a crime, except according to law.'

²¹⁸ Deladda, A. *Afghanistan: The Justice System From A people's Perspective* (Sept 2008) available at www.argoriente.it; p.17

²¹⁹ Sima Samar of the AIHRC at the Rome Conference 2007 cautioned the international community to stop funding traditional justice systems in the country, author's notes from the Rome Conference. See also Drumbl, note 91, chapter 1, p.352

While this may be the case, the lack of customary and Islamic processes in the ICPC may well have impacted negatively on its legitimacy and reception. According to Ahmed, the ICPC's circumvention of *Shari'a* 'reflects a disdainful approach to Islamic law, similar to the Weberian derogatory view of Islamic law as the rule of a simpleton qadi dispensing raw and irrational justice under a tree.'²²⁰ He insists that 'if judicial reform initiatives are to take firm root in Afghanistan, they must spring from an authentic base of Afghan history and sociological cultures, of which both Afghan customary law and Islamic jurisprudence play integral roles.'²²¹ Ahmed's premise on the ICPC accords with the views of those theoreticians who regard legal development as a reflection of local context and his criticisms of the law have been shared by other academics and international experts.²²² Bassiouni observed in 2007 that 'internationally supported rule of law programmes tend to ignore or avoid issues of Islamic law. This negatively impacts the acceptance of these programmes by Afghan society.'²²³ Furthermore, following a review of justice sector reform in Afghanistan in 2008 Suhrke advocated that "to be legitimate and effective legal reform needs to seriously engage with the foundations of justice in Afghanistan, i.e Islamic law, as well as Afghan traditions.'²²⁴

Interestingly, since the ICPC was passed in 2004 there have been a number of developments intent on generating greater co-ordination between the legal traditions that define justice in Afghanistan, which may have wider implications for the use and application of this law while it remains in force. As previously noted, the 'Justice for All,' government paper set out a 10-year plan in 2005 for justice sector reform and recommended exploring ways of engaging the state system with the traditional justice system.²²⁵ Although it failed to prescribe how this should be done or what ideal should be achieved, it represented the first recognition at the government level after the ICPC had been passed that some negotiation between these two systems might be beneficial for improving access to justice in Afghanistan.

²²⁰ Ahmed, F. 'Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code,' (2005) 29 *Hastings International and Comparative Law Review*, 93-134; p.115

²²¹ *ibid*, p.125

²²² Drumbl, note 219, p.353; Krygier et al, note 94, chapter 1, p.16; Brooks, note 92, chapter 1, p. 2314

²²³ Bassiouni et al, note 100

²²⁴ Suhrke, note 72, p.211

²²⁵ Ministry of Justice (2005) *Justice for All*, Kabul: Islamic Republic of Afghanistan, Ministry of Justice, available at <http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afgh.pdf>; p.12

UNDP's 2007 report 'Bridging Modernity and Tradition' provided a possible solution. Adopting a model of justice first proposed by one of its authors, Ali Wardak, in 2004, the report proposed a hybrid model for criminal justice in Afghanistan which allows for alternative dispute resolution mechanisms represented by *jirgas/shuras* but placed under state supervision, and particularly by a Human Rights Unit, to counter concerns regarding the potential for human rights abuses.²²⁶

Under this model serious criminal offences would be dealt with only by the state system, whereas parties involved in minor criminal offences should be referred at first instance to the *jirga/shura* for resolution. Any decision reached by the *jirga/shura*, consisting of at least 6 elected local elders, would be notified to the local district court and a Human Rights Unit to ensure compliance with 'national legal norms' and human rights principles.²²⁷ If the *jirga/shura* is unable to deal with the matter satisfactorily it should be referred to the formal local district courts. Under this system the ICPC would have no application in relation to any cases dealt with by the *jirga/shura*, but would remain relevant in any cases dealt with by the state courts. This collaborative relationship between the formal and informal justice procedures and processes would, it was anticipated, encourage local participation and ownership and improve the legitimacy of the state system.²²⁸

UNDP maintained that without any official endorsement, some areas of the country were already gravitating towards the system of justice it proposed. Judges in Nangarhar province were reportedly referring criminal cases to tribal *jirgas/shuras* for deliberation and resolution and the decisions they reached were reported to the local courts for official state ratification.²²⁹ Support for this model of justice, however, remains divided amongst international donors engaged in justice reform and legal experts in the formal justice institutions. It has been received with caution and mistrust in some justice departments, concerned that it might lead to increased donor support for informal mechanisms and loss of funding for their own departments.²³⁰ The Supreme Court reportedly issued a warning against distributing or citing the report in June 2008.²³¹ There are concerns also surrounding the adoption by the state of the arbitrary decision-making and discriminatory

²²⁶ Wardak, note 36, chapter 3, p.319-341

²²⁷ *ibid*, p.335

²²⁸ UNDP, note 78, p.127

²²⁹ *ibid* p.128

²³⁰ Suhrke, note 72, p. 228

²³¹ *ibid*

practices that are known to characterise the informal *jirga/shura* justice system and about the reality of being able to ensure sufficient oversight by human rights support institutions such as, perhaps, AIHRC, the Women and Children Justice Group and the Huquq Department.²³²

In spite of these concerns current government justice development strategy appears to be geared towards improving the level of co-ordination between the formal and informal justice systems. One of the priority goals identified by the 2008 ANDS was the investigation of 'policies for improved links between formal and informal justice sectors and oversight of the informal by the formal.'²³³ In addition, the NJSS provided for the incorporation of informal justice mechanisms into the formal criminal justice system. In a similar manner to the Justice for All paper, however, neither the ANDS nor the NJSS, specified how this should be done, resulting in the *ad hoc* development of criminal justice practices that meets these targets, which may or may not be conducted in the manner envisaged by Wardak and the 2007 Human Development Report.

Initiatives have, however, been undertaken in Helmand province since 2008 with UK support to establish a criminal justice system which combines informal and formal law and procedure in a similar manner to that proposed by the 2007 report.²³⁴ Here, informal mechanisms have been set up as part of the Afghan Social Outreach Programme ('ASOP'), a government initiative supported by Provincial Reconstruction Teams tasked with improving justice administration and capacity in Afghanistan's provinces. ASOP has established community councils in Helmand which are similar to *jirga/shuras* but consist of elected members. Each community council is divided into three sub-committees, namely an economic and social, a security, and justice sub-committee.²³⁵ When an individual is arrested for a criminal offence in one of the provinces the matter is referred to a Prisoner Review *Shura* (PRS) within 72 hours of the arrest. The PRS is essentially a local-level Afghan led detainee review and processing mechanism. It consists of the local chief of police (ANP), the local heads of the national army (ANA) and the National Directorate of Security (NDS), the District Governor and a member of the justice sub-committee. Details of the background of the case and the evidence against the accused are provided and the

²³² Hirst, note 119, p.5

²³³ Afghanistan National Development Strategy (ANDS) 2008 available at www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, p.65

²³⁴ DFID have been instrumental in establishing the new PRS's in Helmand; Carter, note 30, chapter 3, p.34

²³⁵ interview, UK Justice Adviser, 24.02.2010

PRS collectively decide whether there is any evidence pointing towards the guilt of the accused.²³⁶ It is not required to weigh any evidence at this stage or deliberate upon establishing innocence or guilt. If it determines that there is evidence against an individual, it must then decide if the offence constitutes a serious crime or minor misdemeanour. If the matter is deemed to constitute a serious offence, it is passed on to the investigative prosecutor within 72 hours of the initial arrest period and the case and the suspect will be transferred to Lashkar Gah to be dealt with under the formal justice system.²³⁷ The matter then proceeds under the provisions of the ICPC. If, however, the offence is considered to be minor, the matter is referred to the justice sub-committee for consideration. In these types of cases, the accused will remain out in the community before their case is considered rather than imprisoned. Justice is dispensed by the justice sub-committee in a *shura/jirga* style presided over by community elders. There is no formal procedural framework prescribing what the committee must do or when it should dispose of a case.²³⁸

The PRS system has been criticised for potentially undermining the role of the prosecutor²³⁹ and for institutionalising the involvement of the police, the army, community elders and the District Governor to make decisions regarding criminal cases when they have no statutory authority to do so.²⁴⁰ Yet it provides a transparent and open procedure for the processing of detainees to reduce cases of possible arbitrary detention and constitutes a valuable intersection between the formal and informal justice sector. According to an international expert, the establishment of this new criminal justice system in Helmand has been 'extremely positive,'²⁴¹ and PRS's 'have proved reasonably

²³⁶ *ibid.* It is often the case that people are arrested with no evidence at all pertaining to their guilt for any offence - the arrest can be used as a form of hostage taking.

²³⁷ PRS serious crimes include murder, rape, kidnapping and terrorist offences. In other cases, which may include serious wounding, sexual offences and highway robbery the PRS exercise their discretion in determining the seriousness of the offence; see Hirst, note 119, Appendix III. What tends to happen, however, is that the PRS mixes up the seriousness of the crime with the seriousness of the nature of the offender's history of offending so that if a suspect is annoying but the crime is not that serious the matter might still be referred to the prosecutor; interview, UK Justice Adviser 24.02.2010.

²³⁸ *ibid*

²³⁹ The roles of the prosecutor and the PRS members overlap to the extent that both are tasked with deciding how a criminal matter should proceed from the evidence presented to them within 72 hours of arrest; Walker, note 120, p. 72

²⁴⁰ Any decision by a PRS technically amounts to a violation of the ICPC as it does not provide any authority for such a body to make a determination as to the severity of a crime.

²⁴¹ Hirst, note 119, p.10; Walker, note 120, p. 71. PRS's are only established in districts where there are no prosecutors and it is intended that they should stand down when prosecutors are permanently placed. By 2010 PRS's had been established in 5 districts in Helmand but had been stood down in 3 of them following prosecution placement.

successful...and appear to have the acceptance and support of the communities.’²⁴² Perhaps the ICPC will be considered more appropriate and meaningful for general application in this system of justice where it is adopted as a procedural code only in relation to more serious criminal offences and where minor criminal matters are dealt with by religious elders at the community level, thereby achieving solutions which are acceptable within the communities and which promote positive community relations. This allows more local-led dispute resolution attuned to Afghanistan’s informal legal traditions but built into the formal system and could help to strengthen the relevance and outreach of the formal system. It could also reduce incidences of pre-trial detention at a time when the capacity of the justice sector remains insufficient to deal with all criminal cases, minor and serious, in accordance with the ICPC.

4.4.3 ICPC: The Motivations for legal transplantation and their impact on its reception

The reasons for the development of the ICPC have been noted earlier in this chapter. If there were sufficient reasons for reforming the existing law were there, however, reasonable motivations for choosing to do this by way of legal transplantation? An alternative solution might have been to amend the 1965 Procedural Law by removing and introducing provisions to ensure compliance with international fair trial and human rights standards. As noted in chapter 1, re-cycling pre-existing legislation can be a cost-efficient and expedient solution to developing new law. Not only this, in post-intervention situations reliance on an acceptable legal framework may also increase the legitimacy of a new transitional government among the local population and improve the application of the law by legal practitioners familiar with old provisions at a time of limited professional capacity.²⁴³

There are, however, difficulties with this approach to legislative reform. Applicable laws proved to be inadequate for modern criminal law requirements in Cambodia in 1992²⁴⁴ and reliance on old criminal laws by the UN was problematic in both Kosovo and East Timor.²⁴⁵ So perhaps post-intervention reform by legal transplantation might have offered a better

²⁴² Hirst, *ibid*, p.6

²⁴³ Sannerholm, note 24, chapter1, p.8

²⁴⁴ O’Connor, note 5, chapter 1, p.522-523

²⁴⁵ *ibid*, p.523

solution. UNTAET and UNTAC had both facilitated criminal law reform by legal transplantation. In the context of the ICPC, at the time that it was being drafted international assistance for promoting rule of law in conflict states was still informed by the 2000 UN *Brahimi* report which had advocated the development of interim criminal codes for transplantation in post-intervention countries. There were, then, perhaps reasonable justifications for Di Gennaro's decision to develop a new criminal law in Afghanistan by way of transplantation.

And what of his decision to borrow from the Italian Code? Miller's 'legitimacy-generating' motivation for transplanting law might offer an explanation.²⁴⁶ This would suggest that Di Gennaro contemplated that the ICPC's Italian connection would afford it a level of prestige, providing it with a degree of legitimacy at local and, at the very least, government level. It may well have been the case that the law's Italian connection gave it an authority which led to it being accepted into Afghan law by President Karzai, who was ultimately responsible for making it law. It is unlikely, however, that it led to the ICPC acquiring any real legitimacy either amongst the majority of the Afghan population, who have rarely been affected by its provisions, or among Afghan justice officials, some of whom at the time that the law was prepared resented the Italian control of the drafting process, exemplified by their exclusion of Afghan personnel and the political pressure that the Italians exerted to ensure that the law was ratified.²⁴⁷ Arguably the only potential beneficiaries of any prestige that may have been attached to the ICPC from its Italian origin were the Italians who drafted it and the Italian government. There was, after all, a certain cachet to be acquired in drafting a new law for use and application in Afghanistan which, at the time, was centre-stage in international interest in rule of law assistance programmes. Moreover, the efficient introduction of this new criminal code would help to justify Italy's selection as the country responsible for justice reform.

It is perhaps more likely that speed rather than prestige was a factor in Di Gennaro's decision to transplant law. By 2004 the need for reform of Afghanistan's criminal law framework was urgent. It is well documented that criminal activity can increase sharply when countries are in the process of transition from conflict, undermining the restoration of

²⁴⁶ Miller, note 79, chapter 1, p.839-886

²⁴⁷ Suhrke, note 72, p. 213; USIP, note 72, p.8

peace and stability. This had been the case in East Timor,²⁴⁸ El Salvador²⁴⁹ and Guatemala.²⁵⁰ In Afghanistan there was evidence of a similar trend in crime rates. Between 2002 and 2003 Afghan drug traffickers had earned \$2.3 billion, their profits perpetuating organised criminal activity.²⁵¹ By 2004 more than 40% of Afghanistan's economy was adjudged to be illicit, largely funded by the rapid expansion of the drug trade.²⁵² USIP reported in March 2004 that rule of law had been 'displaced almost completely by the 'rule of the gun.'²⁵³ Furthermore, Taliban insurgency was increasing, resulting in attacks on foreign aid workers and Afghan police.²⁵⁴ Afghanistan would not be able to establish rule of law on a criminalised base.²⁵⁵ This background would have generated an understandable sense of urgency to law reformers such as Di Gennaro in early 2004 and the expediency with which law could be developed by transplantation would have been an attractive motivation for drafting the ICPC in this way, providing a quick legislative solution for what was, after all, intended to be an interim law until the later introduction of a more comprehensive procedural code.

There was also undoubtedly a rationale of modernisation behind Di Gennaro's transplantation of the Italian Code into the ICPC. The applicable criminal law was nearly 40 years old. As noted, the ICJ and the AI reports had highlighted weaknesses in it that were unacceptable in terms of Afghanistan's international obligation to guarantee fair trials to defendants. Adopting provisions from a modern law already applied in a western democracy would ensure that the new ICPC would comply satisfactorily with international expectations not only of fair trial, due process and human rights standards. Transplanting law in this way demonstrates a motivation of modernisation underscored by the ideals of western liberalism and the consequent imperative of ensuring compliance with international human rights norms.

²⁴⁸ Call, note 3, chapter 1, p.378

²⁴⁹ *ibid*, p.377

²⁵⁰ *ibid*, p.378

²⁵¹ USIP, note 72, p.13-15

²⁵² Rubin, B.R. 'Afghan Dispatch', *The Wall Street Journal*, 10.02.2004

²⁵³ USIP, note 72, p.3

²⁵⁴ *ibid*, p.15. See also 'Six days surrounding MSF's decision to withdraw from Afghanistan', *Medicines Sans Frontieres*, 18.01.2004, available at www.msf.org/countries/page.cfm?articleid=AA5AE5CF-05EA-4D43-8DB12C6450CBEA7C regarding the decision by Medicines Sans Frontieres to withdraw from Afghanistan after an attack on an aid worker. See also Haviland, V. 'Afghan Aid Workers Live in Fear,' *BBC News*, 10.06.2004 available at news.bbc.co.uk/1/hi/world/south_asia/3794973.stm

²⁵⁵ Rubin, note 252

Di Gennaro's commentary on some of the provisions of the ICPC highlights a rationale of modernisation to ensure conformity with international criminal procedural expectations. The omission of a confession from a list of 'key tools' that the prosecutor may use to collect evidence, he asserted, 'demonstrates that Afghanistan wants to align its criminal procedure system with those of advanced democratic countries.'²⁵⁶ In addition, for prosecutors to determine whether or not to arrest a suspect in accordance with article 35, he instructed that 'prevailing international standards' should be applied.²⁵⁷ The apparent centrality of human rights protections to the content of the ICPC was also underlined by Aldo Mantovani, the Italian ambassador to the UN, soon after its introduction when he urged that it was 'fully in line with human rights provisions and international standards.'²⁵⁸

As indicated in chapter 2, modern criminal law reform instigated by western democracies is subject to the imperative demand of including human rights and fair trial protections that meet international standards.²⁵⁹ The requirement for legal reform compliant with international human rights norms was regarded as essential by the international partners supporting the new Afghan state and would, in any event, be necessary to ensure conformity with Afghanistan's obligations under international treaties to which it was a signatory.²⁶⁰ It is therefore unsurprising that this imperative would inform the content of Afghanistan's criminal procedure code and be a key motivating factor behind the reliance on legal transplantation to develop this law. Di Gennaro clearly considered that the Italian Code provided a suitable template from which appropriate procedures and rules could be duplicated to ensure that Afghanistan's new criminal procedure would contain adequate due process rights and fair trial standards.²⁶¹

While there were, then, strong motivational reasons for developing the ICPC by way of legal transplantation, some of which were rooted in the reality of the nature of the existing

²⁵⁶ IDLO, note 141, p.46

²⁵⁷ *ibid.*, p.39

²⁵⁸ Ambassador Aldo Mantovani, 'Supporting Gender Justice in Afghanistan: Opportunities and Challenges,' address of the Permanent Mission of Italy to the United Nations, 16 September 2004 available at http://www.womenwarpeace.org/issues/justice/statements/Mantovani_Italy.pdf

²⁵⁹ Krapac, note 15, chapter 2, p.141

²⁶⁰ Afghanistan was at the time of the Bonn Agreement party to the International Covenant on Economic, Social and Cultural Rights (24 January 1983), the International Covenant of Civil and Political Rights (24 January 1983), the International Convention on the Elimination of All Forms of Racial Discrimination (6 July 1983), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (4 February 1985 and ratified on 1 April 1987), the Convention on the Rights of the Child (27 September 1990 and ratified on 28 March 1994).

²⁶¹ interview, former senior Italian government official, Rome, 17.07.2008

justice system in Afghanistan in 2004, the resultant process of this transplantation and the transplanted content of the law have, nevertheless, had implications in terms of its reception. Ahmed has argued that the dominant international influence in the development of the ICPC translates into an imposition of law which has adversely affected its reception among both the Afghan judiciary and the general public.²⁶² It is certainly the case that the processes which led to the development of the law by way of transplantation were driven almost entirely by the international community. The recognition of the demand for a new procedural code and its fulfilment in the form of the ICPC was the product of work undertaken and political measures initiated mostly by international actors and organisations. Research conducted into the existing procedural and substantive criminal law, which demonstrated the need for new legislation, was carried out by international organisations. Italy's involvement in Afghan justice sector reform in 2002 was the result of the United Nation's 'light footprint' approach towards its reconstruction and its assumption of the lead nation role for international assistance to the sector led to Di Gennaro's appointment as special advisor to the Italian government. Di Gennaro, associated with UNODC, would emerge as the principal architect of the new Code. The dominant international influences behind the creation of the Code were reflected in the lack of any Afghan involvement in the drafting process. Poor levels of domestic consultation in the drafting of a law are more likely to engender local perceptions of imposition. This perception, with respect to the ICPC, was potentially heightened by Italy's threat to withdraw funding for justice projects in the event that the law would not be passed.

Any local interpretation of the law as an imposition may indeed have tainted it as a foreign intrusion on Afghan culture and traditional approaches to criminal justice. At the very least this is likely to affect the application of the law and its potential for achieving its objectives. Ahmed, however, has warned of more serious consequences, suggesting that the ICPC may assume political significance as a foreign westernised transplant designed to undermine the authority of legal adjudicators in the country's customary and Islamic criminal justice legal traditions. In this respect it is capable of generating de-stabilising resentment towards the Afghan state.²⁶³ If this is the case, the motivations for relying on legal transplantation to create the ICPC have had damaging consequences, resulting in

²⁶² Ahmed, note 220, p.105.

²⁶³ Ahmed, F. 'Afghanistan's Reconstruction, Five Years Later: Narratives of Progress, Marginalized Realities, and The Politics of Law in a Transitional Islamic Republic,' (2007) 10 *Gonzaga Journal of International Law*, 269-314, p. 291

the creation of what could be termed a 'lethal transplant,' capable of triggering dangerous anti-governmental sentiments.

4.4.4 The extent to which the ICPC has achieved its objectives

The ICPC fails to detail its specific objectives. Nevertheless, bearing in mind the noted motivations behind its introduction and the comments of Di Gennaro and Mantovani, it is reasonable to suggest that it aimed to establish a set of codified procedural rules incorporating internationally acceptable fair trial, due process and human rights standards available for application on an interim basis until the introduction of a new and more comprehensive criminal code. These rules, it was intended, would change the way in which criminal justice would be dispensed in Afghanistan, providing clarity over applicable criminal procedure; encouraging uniform application of criminal law by police, prosecutors and judges; and assisting the promotion of a centralised state criminal justice system which would replace the arbitrary decision-making procedures and practices that can typify customary and Islamic criminal justice processes. These objectives were alluded to by the Italian Undersecretary of State, Margerita Boniver in May 2004 when she explained at a donor conference in Doha, Qatar that the ICPC was 'a simplified text designed to make the work of the criminal police and judges easier and compliant with international human rights.'²⁶⁴ In achieving these goals it was anticipated that Afghanistan's criminal procedure would mirror that applied in western democracies, a requirement of the international community providing significant financial aid to Afghanistan's rule of law reconstruction, and that it would meet the recommendations of the UN for enhancing rule of law development in countries seeking to emerge from conflict.

As a codified law the ICPC certainly provides a procedural framework available for uniform application by legal practitioners processing criminal cases. By being consistent the other key elements of the state criminal law framework, namely the 1976 Penal Code and the 2004 Constitution and by providing a reference point for procedural application by police, prosecutors, defence lawyers and Judges involved in criminal cases it complements efforts to centralise Afghanistan's criminal justice system and strengthen the central state. At the same time, by its application, it can marginalise customary and Islamic approaches to

²⁶⁴ Ahmed, note 220, p.101

justice. Moreover, its provisions succeed in incorporating rules and procedures that are aligned with international expectations of fair trial, due process and human rights.

Whilst this is the case, the ICPC has encountered significant difficulties in achieving the objectives identified above. Although it was designed to be a trimmed down criminal law only for interim application it has not proved to be a sufficiently comprehensive interim code containing the necessary requisite provisions to cover all procedural eventualities. Its failure to emphatically replace previous criminal procedural legislation and its revocation of only those laws which are incompatible with it means that rather than being able to refer to one all-inclusive criminal code Judges are required to navigate through various pieces of legislation to determine which procedural rules should be applied. For example, while the ICPC reduced the maximum period of pre-trial detention from 10 days to 24 hours,²⁶⁵ this period was extended by the Police Law in 2005 to 72 hours²⁶⁶ and the CNL 2005 introduced new search, surveillance and seizure provisions and increased the 30-day period from arrest to indictment.

The requirement for amendments to its procedure in legislation such as the Police Law and the CNL, both passed only one year later, suggests that the ICPC was not a sufficiently comprehensive interim criminal procedure code, a criticism confirmed by experts interviewed for this research. A PRT advisor suggested in 2010 that the ICPC failed to provide sufficient 'clarity over rules of evidence, particularly those relating to the use of scientific and hearsay evidence.'²⁶⁷ Furthermore, a UK Home Office expert observed of the ICPC in 2008 that 'there is a great need for consolidation...and full coverage of the law.'²⁶⁸

Moreover, the ICPC's allowance for judicial discretion over which procedural rules in pre-dating, post-dating and occasionally contradictory legislation should be applied, without providing any guidance as to which law should take precedent, only increases the scope for confusion and inconsistent application of state criminal procedure.²⁶⁹ To that extent the ICPC has not succeeded in replacing the uncertainty surrounding applicable criminal law

²⁶⁵ article 31 ICPC, reducing the 10-day period stipulated in the Law on Investigation and Discovery of Crimes (1978)

²⁶⁶ Police Law 2005, article's 15 and 25

²⁶⁷ interview, UK Justice Adviser, 24.02.2010

²⁶⁸ interview, senior member of UK Rule of Law team, 29.02.2008

²⁶⁹ UNAMA *Overview*, note 78, p.7; Benard et al, note 97, who state that 'the laws are sometimes contradictory, and it is unclear which should take precedent,' p.155

referred to in AI's 2003 report with the clarity that was required and has not in all respects helped to make the work of judges and criminal police easier in the way that Boniver predicted.

Nor can it be concluded that the ICPC has succeeded in promoting the uniform application of state criminal law. It is not being applied consistently by all legal practitioners and it has yet to succeed in ensuring that the arbitrary decision-making practices associated with Islamic and customary criminal justice have been replaced by reference to and the application of its own predictable and prescriptive procedural rules. This is the case both within the state justice system and outside it. The vast majority of the population still refer criminal matters to customary and Islamic justice procedures that exist outside the state system. Within the state system many judges do not adhere to the procedural rules that the law prescribes and continue to be influenced by Islamic interpretations of criminal justice. It is interesting to note that the findings of various recent reports that confirm that Judges are applying customary law and *Shari'a* in relation to criminal cases mirrors the observations of the 2003 AI report compiled before the ICPC came into force. This suggests that the ICPC has had little impact in successfully changing the way in which criminal law is applied in Afghanistan and in promoting a centralised state justice system.

Furthermore the ICPC has arguably failed to achieve Boniver's stated objective for the law of ensuring that the work of criminal police and judges is compliant with international human rights. A Judge based in Kabul has suggested that it had no influence at all on judicial consideration of defendant's human rights in criminal cases. This Judge confirms that 'we always consider human rights and fairness but that is because we are Judges, not because of some law. The ICPC has made no difference to how it was before the Taliban and the Soviets.'²⁷⁰ In fact, although the ICPC provides protections for defendants facing criminal charges that are consistent with international expectations of due process and fair trial in practice they are not always applied. An international expert formerly employed by UNAMA confirmed in 2008 that 'based on the monitoring we have done...the application of fair trial standards and adherence to international human rights standards is very poor.'²⁷¹ Contrary to its provisions defendants are denied access to or not informed of their right to legal representation and defence lawyers are obstructed from representing their clients

²⁷⁰ CJTF Judge, 22.03.2009

²⁷¹ UNAMA senior Rule of Law officer, 19.11.2008

and attending trials. Similarly, the procedures regarding detention timeframes allowing for the suspension of sentences are routinely ignored by Judges.²⁷² Furthermore, suspects arrested or detained on criminal charges are not brought promptly before judges or prosecutors or entitled to a trial within a reasonable period, in contravention of article 9(3) of the ICCPR. In 2007 approximately 6,000 detention matters were awaiting adjudication.²⁷³

Arguably is it also the case that the ICPC fails to provide sufficiently comprehensive human rights and due process protections. It omits to specify whether a defendant should be released if they are not questioned within 48 hours. It also fails to insist on a review of detention before the first hearing and to prescribe what test should be applied to determine the legality of an arrest. Moreover, the ICPC provides insufficient alternatives to imprisonment. Police are not afforded any powers under the law to divert cases away from prosecution and to discharge a suspect or issue warnings if the offences fall within the ambit of state criminal law.²⁷⁴ Under the ICPC pre-trial detention is not a means of last resort in criminal proceedings in Afghanistan, contrary to the UN's Standard Minimum Rules for Non-Custodial Measures.²⁷⁵ Its inadequate fair trial and human rights guarantees as well as the poor application of the protections that it does provide are contributing to the high conviction and arbitrary detention rates that have characterised the state criminal justice system since its introduction into law. Rather than promoting human rights, it is often a wrongly applied state mechanism responsible for human rights abuses.

Conclusion

This evaluation of the ICPC examines the extent to which it has been accepted and achieved its objectives and seeks to establish if it has been successfully received in Afghanistan to determine if it was reasonable for legislators to rely on legal transplantation to develop it.

²⁷² ICPC, articles 6 and 89

²⁷³ UNDP, note 78, p.8

²⁷⁴ UNODC, note 78, p.11

²⁷⁵ UN, *Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)* 14.12.1990, available at www.2ohchr.org/english/law/pdf/tokyorules.pdf

It is possible to suggest that there was every justification in resorting to the legal transplant mechanism to develop this law. Di Gennaro, who was largely responsible for the final draft, was an expert in Italian criminal law and the Italian procedural code provided a useful template from which procedures could be borrowed for dissemination into this new Afghan Code. These procedures, furthermore, would offer a collaboration of civil and common law rules not dissimilar to those that existed under the 1965 CPC, affording some consistency with previous Afghan state criminal procedure law. Moreover, developing law by means of legal transplantation was not new to the Afghan state criminal justice system. The 1965 Procedural Code and the 1976 Penal Code were both developed in this way. According to an Italian expert the ICPC, as a legal transplant, 'has been appropriate because it has not inserted issues unknown to the Afghan legal history into the domestic legal order. On the contrary it has relied on the Afghan legal tradition which has been influenced by the French/Italian civil law system since the [nineteen] twenties.'²⁷⁶ In 2004 the transplant mechanism would offer Di Gennaro a quick and efficient process for responding to recommendations for urgent reform, modernizing Afghanistan's criminal procedures and ensuring that they would be equipped with internationally appropriate due process, fair trial and human rights norms, fundamental objectives of international donors providing valuable financial assistance to rule of law reconstruction.²⁷⁷ In addition, developing the criminal law framework by legal transplantation would accord with contemporary UN recommendations for reconstructing rule of law in countries seeking to emerge from conflict.²⁷⁸

These justifications for employing the legal transplantation mechanism coupled with the fact that the ICPC has succeeded in providing a procedural criminal law framework for application by criminal practitioners might suggest that it was reasonable to develop the law in this way.²⁷⁹ Indeed, it is possible to argue that it may have a valuable place in an evolving criminal justice system along the lines being of that being developed in Helmand province that accords with the proposals of Wardak in 2004 and the HDR in 2007 and the ANDS goals identified by the government in 2008.

²⁷⁶ Italian legal consultant, 19.11.2008

²⁷⁷ interview, UNAMA senior Rule of Law officer 17.10.2007

²⁷⁸ UN, *Brahimi Report*, note 85, chapter 1

²⁷⁹ interview, UK Justice Adviser 24.02.2010, according to whom the ICPC has been a successful legal transplant because it has 'provided a framework and a secure operating environment. It gives people the tools to deal with a situation.'

However, the application of the evaluative test proposed in Chapter 2 reveals that the ICPC has not been a successful legal transplant. Police, prosecutors, judges and defence lawyers are failing to apply its provisions properly or failing to apply them at all. Judges reach decisions based on their own intuition or on Islamic interpretations of justice rather than with reference to the procedures prescribed in the Code. The persistent application by state judges of *Shari'a* in the courts as well as the continued referral of the overwhelming majority of criminal matters to customary and Islamic justice authorities suggests that the ICPC is not considered meaningful and appropriate for use either by legal practitioners or the general Afghan public. Overall, it has struggled to be accepted and has failed to achieve many of its objectives.

The views of a PRT Justice Advisor based in Helmand are insightful in relation to identifying problems with the ICPC. In her view 'the problem is not that they don't want it [the ICPC] or even that it is Italian – but that they do not have it, because of security issues. They are not reacting in a negative way to the law itself. They are not failing to apply the ICPC because it is foreign. It is the law and they recognise that. They are not actively dis-applying it – just apathetically not applying it.'²⁸⁰ The apathetic failure by justice authorities to apply the provisions of the Code is to a large extent the result of the many challenges facing the Afghan state justice system - and in the case of Helmand, primarily security issues. The poor capacity and competency of personnel in the justice institutions, insufficient resources and the insidious influence of pervasive corruption amongst justice officials compromise its application. There are insufficient numbers of defence lawyers to provide representation to every defendant who requests it and insufficient numbers of Judges to preside over cases. The legal aid scheme is also not sufficiently well developed to enable defendants to receive free legal advice and assistance in contravention of the provisions of the Code. These constraints have adversely affected the application and reception of the law.

There have, however, also been problems with the reception of the law which are directly associated with its transplanted content. It is not a comprehensive interim criminal code. According to a principal UNAMA rule of law advisor 'it is not good that this criminal procedure code did not sufficiently provide for bail.'²⁸¹ In defence of the law according to

²⁸⁰ *ibid*

²⁸¹ interview, UNAMA senior Rule of Law officer, 17.10.2007

this expert, it 'was written specifically post-conflict when Afghans needed something relatively straightforward that they could implement.'²⁸² Nevertheless, the transplantation of rules from an Italian source resulted in procedural inadequacies and omissions which have engendered avoidable confusion amongst practitioners and increased the potential for the arbitrary detention of detainees. The ICPC has also failed to provide total clarity over state criminal procedure, or to ensure that the work of police and judges is compliant with international human rights standards. All of these factors suggest that it was unreasonable to develop this law by borrowing foreign procedural rules.

There is some concern, furthermore, that the process by which the ICPC was developed – with minimal Afghan involvement – and the transplanted nature of its content may result in it being construed as a foreign imposition and as a political act designed to promote centralisation based on a western model at the expense of local Afghan culture and justice mechanisms. The very fact of its legal transplantation has compromised its legitimacy. More worrying than this, commentators such as Ahmed have warned of the ICPC's capacity for provoking resistance among *ulama* if it is perceived as a threat to their religious authority which could contribute to the destabilisation of the central state in a manner similar the regimes of Ammanullah and Daoud.²⁸³ If this is to be believed, it certainly supports a conclusion that it was unreasonable to develop this law by means of legal transplantation as it was the allure of the transplant mechanism that profoundly affected its content and the manner in which it was drafted.

Ahmed's views about the potential of foreign legal transplants such as the ICPC to trigger conflict in Afghanistan rest on a wider picture of historic resistance to attempts by the state to establish a unified legal system in the country, of which a law such as the ICPC is representative, and also on the conviction that the *ulama* uniformly oppose such secular and transplanted laws.²⁸⁴ A study conducted in Saidabad district in Wardak province in 2007 seems at first instance to support Ahmed's fears.²⁸⁵ It confirmed that in criminal cases where there was a conflict between *Shari'a* and state law, religious legal authorities viewed any failure to apply *Shari'a* as evidence of western designs to undermine Islamic

²⁸² *ibid*

²⁸³ Ahmed, note 263, p.291

²⁸⁴ *ibid*, p.299

²⁸⁵ Wardak M., Zaman, I. And Nawabi, K., *The role and functions of religious civil society in Afghanistan: Case studies from Kunduz and Sayedabad*, Kabul: Cooperation for Peace and Unity (CPAU) (2007) available at http://www.cpau.org.af/Research/Docs_our_publications/Religious%20Civil%20Society%20in%20Afghanistan.pdf

jurisprudence.²⁸⁶ However, the same authorities also viewed the relationship between secular law and Islamic law as essentially non-conflictual, which suggests that they acknowledge that there is a legitimate place for statutory codified law in Afghanistan's criminal justice system. State law therefore has the potential to exist without provoking the opposition that Ahmed seems to regard as inevitable because of its transplanted nature. The real concern, however, in relation to the ICPC is that the process of its transplantation, driven largely by modernisation and expediency, as well as its transplanted content have not in any way resolved the discrepancies that have existed between secular, Islamic and customary conceptions of criminal justice and which remain divisive and political issues.²⁸⁷ Its failure to offer some negotiation between these legal traditions means that, as Roder suggests, it has in fact 'worsened this situation.'²⁸⁸ As a legal transplant it provides procedures which are abused, misunderstood and misapplied by the actors who are supposed to be implementing them, leading to injustices which can undermine rule of law, defeating the key objective for which it was introduced, and transforming it into a driving force for the insurgency which continues to plague Afghanistan. In that context it has every potential of being a 'lethal' rather than an effective legal transplant, suggesting that it was unreasonable for those responsible for it to have developed it by legal transplantation.

²⁸⁶ The mullahs viewed the failure to observe *Shari'a* in the apostasy case concerning Abdul Rahman in 2006 as an example of western interference in the manner in Afghan criminal justice should be dispensed; Suhrke, note 72, p. 225

²⁸⁷ At the time of the Rome Conference in July 2007 a group of 200 Afghan clerics from Herat province called for the nationwide enforcement of *Shari'a* for criminal cases; Roder, T.J., 'Little Steps Forward: Some Remarks on the Rome Conference on the Rule of Law in Afghanistan' in von Bogdandy, A. and Wolfrum, R. (eds) *Max Planck Yearbook of United Nations Law, Volume II* (2007) Koninklijke Brill N.V., p.307-312, p. 309

²⁸⁸ *ibid*

5 An Evaluation of The Counter Narcotics Law 2005

Introduction

This chapter considers the Counter Narcotics Law, passed by Presidential Decree on 18 December 2005, and evaluates it as a legal transplant. It draws on quantitative data as well as original qualitative material obtained from a number of interviews conducted with Afghan and international legal personnel based in Afghanistan, including senior representatives from the judiciary, prosecution and defence services with experience of the law. Organised in a similar manner to the evaluation of the ICPC in Chapter 4, Section 5.1 reviews the main provisions of the law; Section 5.2 reflects on the reasons for its development; Section 5.3 examines why it can be interpreted as a legal transplant; and Section 5.4 applies the evaluative test proposed in chapter 2, leading to conclusions regarding the extent of its successful reception in Afghanistan and whether it was reasonable for it to have been developed by means of legal transplantation.

Section 5.1 The Counter Narcotics Law 2005

Consisting of 58 articles divided into 8 chapters, the CNL contains a number of objectives, broadly divided between prohibited and authorised activities, considered in detail in section 5.4.4. It also provides for the establishment of the Special Narcotics Force¹ within the MOI to detain and arrest suspects and hand them over to the Counter Narcotics Police of Afghanistan (CNPA).² In addition, it formally provides for the establishment of the Central Narcotics Tribunal within the Primary Provincial Court and the Appellate Provincial Court both based in Kabul³ and it grants the Tribunal exclusive jurisdiction to consider any drug trafficking case in which the amount of heroin, morphine or cocaine seized exceeds 2kgs, the amount of opium is more than 10kg or the total weight of hashish or other specified

¹ article 40

² article 40(1)

³ article 34

illegal substances is greater than 50kg.⁴ Drug trafficking cases involving lesser quantities of prohibited drugs are declared as falling under the jurisdiction of Public Security Tribunals in the Provincial Courts.⁵

The offence of 'drug trafficking' is widely defined under article 15 as including activities such as the production, manufacture, distribution, possession, sale and transportation of specific illicit drugs.⁶ The investigation, prosecution and trial of these offences is to be conducted in accordance with the provisions of the ICPC 'and other relevant laws,' which the CNL fails to detail. Moreover, in the event that the CNL lacks the required provisions to decide on a penalty for an offence, the provisions of the Penal Code are stated to apply and to avoid confusion over which law should apply for imposing penalties for offences, it stipulates under article 56 that 'where existing laws and regulations conflict with this law, this law shall prevail.'⁷

The CNL prescribes penalties for offences relating to the cultivation,⁸ use,⁹ possession¹⁰ and trafficking¹¹ of illicit drugs and for the operation of facilities for storing them and drug laboratories.¹² In addition, it provides penalties for importing or using equipment and materials for producing and processing illicit drugs,¹³ for corruption and bribery perpetrated in connection with trafficking operations¹⁴, the prescription of illegal drugs¹⁵ and the use or possession of weapons in connection with drug trafficking.¹⁶

There are key sentencing provisions in article 16 for drug trafficking offences. Trafficking offences involving heroin, morphine or cocaine involve sentences ranging from imprisonment for 6 months to a year and a fine not exceeding 50,000 Afghanis for quantities under 10 grams to mandatory life imprisonment for amounts over 5 kilograms

⁴ article 34(1)

⁵ article 34(5)

⁶ article 15

⁷ article 56(1)

⁸ article 26

⁹ article 27

¹⁰ article 27 for personal consumption; article 15 for possession in the context of drug trafficking

¹¹ article 15

¹² article 19

¹³ article 20

¹⁴ article 21

¹⁵ article 24

¹⁶ article 22

and fines of up to 10 million Afghanis.¹⁷ Offences involving opium or its derivatives attract sentences varying from 3 months imprisonment and a fine up to 25,000 Afghanis for amounts less than 10 grams to life imprisonment and a fine of 5 million Afghanis for quantities in excess of 50 kilograms.¹⁸ Furthermore, anyone convicted of organising, financing or controlling trafficking activities involving 3 or more people is liable to receive a sentence three times more severe than those apprehended with the drugs, subject to a maximum sentence of 20 years.¹⁹

Penalties for use and possession for personal consumption include provision for imprisonment for periods ranging between three months to a year depending on the substance and for the imposition of fines in addition.²⁰ Any possession of more than 1 gram of heroin and cocaine and 10 grams of opium or hashish results in a referral for sentencing under the provisions in article 16.²¹

In addition, the 2005 law introduced procedures for the stop and search of suspects²² and vehicles and for the seizure of assets.²³ It also provided new investigative provisions enabling for covert electronic surveillance, undercover operations and the use of informants, aimed at helping to secure the conviction of medium and high-level drug traffickers.²⁴

Section 5.2 Reasons for the Development of the CNL

The passing of the CNL was to a large extent a reaction to the failure of counter-narcotics reform initiatives undertaken by the Afghan government and its international supporters between 2001 and 2005. In May 2003 a 5-year National Drug Control Strategy (NDCS) was adopted following extensive consultation with international experts from the US, the UK and UNODC²⁵ which contained the ambitious objective of reducing opium cultivation by

¹⁷ article 16(1)(i)-(vi)

¹⁸ article 16(2)(i)-(vii) and article 27

¹⁹ article 16(4).

²⁰ article 27 (1)(a)-(c)

²¹ article 27 (1)(d)

²² articles 44-46

²³ article 42

²⁴ articles 47-51

²⁵ Blanchard, note 278, chapter 3, p.116

70% by 2008 and eliminating it by 2013²⁶ and identified judicial reform as one of five key areas on which to concentrate efforts to facilitate this.²⁷ In this respect it recognised 'the need for [the] establishment of an efficient and modern criminal justice system to address drug trafficking' and promised that 'proper laws will be enacted'²⁸ which would include a 'national law on drug trafficking and related offences' in the drive towards establishing an 'anti-drugs legislative system that meets international standards.'²⁹

The result was a new Counter Narcotics Law was passed in October 2003, drafted quickly with very little input from or consultation with local representatives³⁰ and transplanted from a UN 'model' law with deliberate omissions in order, apparently, to make it more comprehensible to Afghan practitioners.³¹ This represented a diversion from the previous 1991 law which, according to one international expert, was 'basic and just imposed imprisonment for trafficking and cultivation,'³² and provided for the regulation of illicit drug-related offences and the classification of drugs and precursors in accordance with internationally approved standards. However, by late 2004, according to UNAMA, 'there was a consensus that the [CNL 2003] needed revision.'³³ It failed to provide the police and prosecutors with the necessary modern mechanisms required to successfully apprehend and convict drug traffickers, particularly those at the top end of the trade with international connections who were adopting increasingly sophisticated trafficking strategies. A new law could provide police and prosecutors with more modern tools to deal with counter-narcotic crime.³⁴ New initiatives were required.

By this stage it was clear that counter-narcotic strategies were failing. There were at least 15,000 opium traders and approximately 10% of the total population were involved in

²⁶ *National Drug Control Strategy 2003* available at www.cicad.oas/fortalecimiento.../National%20Plans/USA%2003.pdf, p.9

²⁷ *ibid*; the others being institution building, law enforcement, alternative livelihoods and demand reduction

²⁸ *ibid*, annex p.v

²⁹ *ibid*, annex p.vi

³⁰ email correspondence, International Drugs and Development Adviser, 13.12.2008; it 'was drafted by 'experts' from UNODC' who only had two visits with the Afghan delegates in order to draft the legislation. According to this source those involved with the law were required to draft it within a very short time-frame, which may have accounted for the minimal consultation with local actors

³¹ *ibid*; the interviewee states that 'the 2003 law ... was based on the UN 'model' law but with several omissions due to the lack of any Afghan understanding of what it was.'

³² *ibid*

³³ UNAMA, note 154, chapter 2, p.7

³⁴ According to the NDCS 2006 although the 2003 CNL 'was a major step forward compared to previous legislation ... it did not address the 'working needs' of drug law enforcement officials;' see *National Drug Control Strategy 2006* available at http://www.fco.gov.uk/resources/en/pdf/pdf18/fco_nationaldrugcontrolstrategy, p.45

poppy cultivation.³⁵ Opium production was estimated at 4,200 tons, 23 times more than that produced 20 years earlier.³⁶ Profits from the narcotics trade were worth \$US2.2 billion a year and the industry had become deeply interwoven with not only the economic, but also the political and social fabric of the country.³⁷ Opium was being cultivated in all of Afghanistan's provinces³⁸ and profiteering from its production was financing insurgency, encouraging corruption and increasing warlord power, which combined to represent a huge threat to domestic state building and rule of law reform efforts.³⁹ UNODC warned that 'unless the drug problem is solved, there will be no sustainable development for Afghanistan.'⁴⁰

The CNL was introduced as a legislative solution to Afghanistan's 'drug problem.' In recognition of the spiralling narcotics problems the Afghan government published a Counter Narcotics Implementation Plan in February 2005, following a period of consultation with international experts, which set out eight pillar activities designed to tackle the cultivation, production and trafficking of drugs in Afghanistan. That concerned with 'criminal justice' identified a number of key targets, amongst which were the development of 'a more effective criminal justice system,' (a tacit admission that the prevailing system was inadequate), the establishment of a new Court and prison in Kabul dedicated to major drug trafficking cases and the introduction of 'an effective counter narcotics legal framework'.⁴¹

In alignment with these requirements a centralised counter-narcotics Criminal Justice Task Force (CJTF) was established by the Afghan government in co-operation with the UK and with support from the US and UNODC, becoming fully operational in July 2005.⁴² UK representatives noted that 'in a climate where counter narcotic law was largely unimplemented, it was decided a dedicated, highly-mentored unit was essential to deal

³⁵ Byrd, W. and Ward, C. *Afghanistan's Drug Economy. A Preliminary Overview and Analysis*, Draft Technical Annex 2. Washington: World Bank (2004)

³⁶ UNODC, *The Opium Economy in Afghanistan. An International Problem* (2003) available at reliefweb.int/w/rwb.../214e1694bbf78591c1256cc60049f953?, p. 81

³⁷ UNODC, *World Drug Report 2006* available at http://www.unodc.org/pdf/WDR_2006/wdr2006_volume1.pdf, p.212. See Appendix 6 for discussion on Afghanistan's emerging drug economy 1924-2005

³⁸ UNODC, *World Drug Report 2005* available at http://www.unodc.org/pdf/WDR_2005/volume_2_chap5_opium.pdf, p.179

³⁹ UNODC, note 37, p.212

⁴⁰ *ibid*, p. 210

⁴¹ *The Counter Narcotics Implementation Plan* (16.02.2005) available at http://www.afghanemb-canada.net/en/counter_narcotics

⁴² UNAMA, note 33, p.33

effectively with serious counter narcotic related crime, and demonstrate to traffickers they were at real risk of prosecution.⁴³ The CJTF was composed of specialist investigators, prosecutors and judges trained to expedite significant counter narcotics cases.⁴⁴ The result of this revised counter-narcotics programme was the creation of an integrated system of criminal justice that would exist parallel to the poorly functioning existing justice system and which would be specifically dedicated to drug-related criminal cases capable of being fast-tracked through new centralised courts, namely the Central Narcotics Tribunal (CNT) Primary and Appeal Courts, devoted solely to narcotic-related crime. A new counter-narcotics law was required that would be the centre-point of these new initiatives and which would also have the pragmatic significance of establishing the jurisdiction of the CNT by law and formalising the statutory powers of the Ministry of Counter Narcotics (MCN), founded in December 2004 to co-ordinate counter-narcotics activities.⁴⁵

Section 5.3 The CNL as a Legal Transplant

While the CNL was a product of collaboration between the UK, the US and the Afghans it is regarded locally as an internationally-led law,⁴⁶ a perception heightened by the fact that it was drafted in English as opposed to Dari or Pashto.⁴⁷ In reality, it was largely designed by the UK and the US. The UK had a larger input with the operational sections of the law such as the provisions dealing with electronic interception and surveillance, which were new counter-narcotic legal concepts in Afghanistan.⁴⁸ The US were intent on imposing mandatory sentences for drug offences and providing for the extradition of suspects for trial abroad, both of which were included in the final draft.⁴⁹ The first draft was prepared by members of the Drugs Team from the UK Home Office stationed at the UK Embassy in Kabul in 2005.⁵⁰ They were not, however, trained lawyers⁵¹ and the UK acknowledged that it lacked the necessary personnel to competently complete the drafting process, at which

⁴³ *The Criminal Justice Task Force – Lessons Learned*, Conference on the Rule of Law in Afghanistan, Rome (02.07.2007), held on file, p.1

⁴⁴ Its jurisdiction, defined in the CNL 2005, extends to any case where the amount of heroin, morphine or cocaine seized exceeds 2kgs, opium exceeds 10kg or hashish or other specified illegal substances exceeds 50kg (article 34(4)(a)-(c))

⁴⁵ interview, International Drugs and Development Adviser 18.06.2009. Although the MCN was formed in early 2005 and had two Deputy Ministers it had not yet been accorded any formal statutory powers

⁴⁶ interview, senior member of the UK Rule of Law team, 29.02.2008

⁴⁷ UNAMA, note 33, p.7

⁴⁸ interview, international Drugs and Development Adviser, 09.12.2008

⁴⁹ Possibly because US personnel were more involved than UK Home Office actors at the end point of the drafting process; interview, note 46

⁵⁰ *ibid*

⁵¹ interview, senior prosecutions adviser, 25.06.2008

point it sought the assistance of two US Department of Justice Deputy District Attorney-Generals,⁵² who had been working alongside various retired military policemen, US Drug Enforcement Administration (DEA) agents, Norwegian judges and lawyers employed as mentors within the CJTF.⁵³

There were opportunities for Afghan involvement in the drafting process. The UK was assisted by Dr Abdul Jabar Sabet, later to be appointed Attorney-General, but who in 2005 was acting as both a legal adviser for the MOI and the UK Drugs Team, with which he had a very close working relationship.⁵⁴ The UK provided Sabet with a framework for the law and asked him to review it, applying his experience of domestic criminal and counter-narcotics law.⁵⁵ Some additional personnel in the AGO followed the legislation in its drafting stages through to its enactment. To that extent Sabet and the AGO had every reasonable opportunity to approve or amend the CNL before it was passed by Presidential Decree in December 2005.

As it turned out, however, the contribution of the AGO and also the Supreme Court to the drafting stages proved to be relatively minor, confined principally to ensuring that it included a rigorous sentencing structure, which emerged as the primary concern of Afghan contributors to the process.⁵⁶ The comparatively inconsiderable role played by Afghan actors to the drafting stages of the CNL may have been due to a lack of professional capacity within the AG and Supreme Court departments. It was apparent to the international actors at the time that there was not a great wealth of legislative reform experience amongst Afghan officials who might have been in a position to contribute to the process.⁵⁷ Additionally, there may have been a lack of willingness amongst domestic actors to contribute meaningfully to the drafting task. It would have distracted them from their other administrative responsibilities and exposed them to criticism if the law was later construed as being flawed.⁵⁸ It is likely also that the 'lead nation' policy installed following the Tokyo Conference generated a culture of dependence by domestic officials on the experience of international actors to complete technical and demanding tasks of this nature.

⁵² Bruce Pagel and Bill Hogan

⁵³ interview, note 46

⁵⁴ *ibid*

⁵⁵ *ibid*

⁵⁶ interview, senior member of the UK Rule of Law team, 25.03.2008

⁵⁷ interview, note 46

⁵⁸ *ibid*

It is equally possible that the potential for greater Afghan contribution was compromised by the speed with which the CNL was drafted and passed. It was, a senior prosecution advisor with the British Embassy Drugs Team later reflected, 'too rushed'.⁵⁹ There was a sense of urgency about the drafting process given the recognised demand amongst the UK and international donors in particular for a new counter-narcotics law that would complement the revised strategy that envisaged a new justice system dedicated to drug crime, augmented by the CJTF, the CNPA and new courts. But the speed with which it was prepared was, in all likelihood, also the result of political ramifications. Once Parliament returned, it would have to be considered by the *Taqnin*, entailing a lengthy consultation process and inevitable postponement of the potential impact of the new counter-narcotics policy. Ultimately it was passed by Presidential decree just one day before Parliament was due to convene.⁶⁰ In fact, then, the drafting process of the CNL 2005 was similar to that of its predecessor. It was drafted quickly, based on international models and contained provisions conforming to international conventions.

Given the combination of all of these factors, the CNL 2005 contains many of the hallmarks of a legal transplant. It established centralised institutions, the operation of which were internationally funded. The new judges, police and prosecutors employed by these institutions would be internationally trained and placed under foreign scrutiny and invigilation. There was only marginal input by or consultation with local actors during the drafting stages. It may be a piece of Afghan legislation but it is regarded as an international law which fundamentally includes borrowed foreign principles of acceptable counter-narcotics law, drafted in a foreign language mainly by foreign actors.

Section 5.4: Evaluating the Counter Narcotics Law 2005

5.4.1 The Application of the CNL

The CJTF, which applies the CNL with respect to more significant drug cases under article 34, is situated within a \$US 12 million compound in central Kabul and comprises over 150 staff. These include 40 CNPA investigators from the MOI and 35 prosecutors seconded from the AGO, all of whom are selected on the basis of ability and integrity. There are also

⁵⁹ interview, note 51

⁶⁰ interview, note 45

13 Judges provided by the Supreme Court, seven of whom preside at the Primary Court and 6 at the Appeal Court.⁶¹ Situated in the compound is a Detention Centre containing 50 beds for detaining suspects and is staffed by personnel from the Central Prison Division under the aegis of the MOJ. There are also barracks for the prison staff and a Judicial Security Unit responsible for maintaining the security of the compound, ensuring the protection of Judges and staff and the safe transfer of prisoners on site. All of the units in the compound have been built as separate entities. Therefore, police investigators work in one building and Judges in another in an effort to preserve the integrity and independence of the departments engaged in applying the law.⁶²

There are four different types of Prosecutors based at the CJTF who are applying the CNL. Investigative prosecutors conduct all the necessary investigations in relation to a drugs case which comes within the jurisdiction of the CNL. This may involve working closely with the police during the questioning and interrogation of a suspect and attending crime sites and viewing drug hauls. Investigations should be concluded within 15 days of receiving a case, although prosecutors are able to apply for an extension of time for up to 15 days on application to the Court.⁶³ At the end of the prescribed investigative periods, which cannot exceed 30 days, the investigative prosecutor must either release the suspect or serve them with an indictment. This consists of 6 to 7 pages of script detailing the case against the accused, which is served on them and filed at Court. Cases will be timetabled with lists published and made available to the accused and defence lawyers and trial dates should be set down within 2 months of the service and filing of an indictment.⁶⁴ The CJTF try to ensure that defence lawyers to whom drug cases are referred are members of the AIBA as it imposes a code of conduct and ethical standards.⁶⁵ In practice, there tends to be a select group of defence lawyers affiliated with the Bar Association to whom cases are referred on a regular basis.⁶⁶

UK mentors have been working with the prosecutors to try to change a predisposition for automatic referral of cases to trial having noted that some prosecutors, and particularly

⁶¹ Figures provided by FCO official based at the CJTF during interview on 23.02.2010. See also <http://www.cjtf.gov.af/en/aboutus.html>.

⁶² interview, note 61

⁶³ investigations and prosecutions are conducted in accordance with article 36 ICPC, article 37(9)

⁶⁴ interview, note 61

⁶⁵ The AIBA was formed in September 2008 further to the Advocates Law (November 2007). A Code of Conduct was approved in January 2009; see <http://www.aiba.af>

⁶⁶ interview, note 61

those who were trained in Moscow or in Afghanistan under the Soviet court system, had a propensity to refer cases without proper assessment of the evidence and prospects of securing a conviction.⁶⁷ Procedural changes have been introduced to ensure that cases are properly reviewed before a decision is taken to set a matter down for trial and it is currently estimated that approximately 85% of the cases received by the CJTF proceed to trial.⁶⁸

If an indictment is served the case is transferred to a Primary Prosecutor who will present the case for the prosecution at the trial. At the end of the trial Judges retire to chambers to deliberate and agree a finding. If they find the defendant guilty they will also determine the sentence at that stage. The judgement and sentence will usually be confirmed in writing.⁶⁹

If the matter is appealed, which according to a senior CJTF prosecutor tends to be 'inevitable',⁷⁰ it will be referred to the CNT Appeal Court. The prosecution file will be transferred to the Appellate Prosecutor who assumes responsibility for preparing and presenting the case for the prosecution at the appeal hearing which should be conducted within 2 months.⁷¹ At the end of the appeal process the accumulated prosecution case file will be passed to trial prosecutors. They scrutinise the paperwork and the procedures that have been followed and prepare cases for trial at the Supreme Court if it is referred for further appeal, which in practice is relatively rare (Figure 2).⁷²

The CNL contains penalties for imprisonment which relate in practice not only to cases involving the possession and trafficking of large quantities of narcotic drugs, which are referred to the CNT, but also to low-level drug offences dealt with in Provincial Courts which might involve the use or possession of small quantities of drugs. There are concerns that the sentencing provisions are excessively harsh and fail to enable an appropriate degree of judicial discretion.⁷³ Imprisonment appears unavoidable under the law, even for possession of small quantities of illicit drugs. Article 27, for example, fails to define any lower limit for possession entailing imprisonment. The result is that the possession of small amounts of cannabis amounting to less than 10 grams attracts a term of imprisonment of

⁶⁷ interview, CNTF prosecutions casework adviser, 06.02.09

⁶⁸ *ibid*

⁶⁹ interview, note 61

⁷⁰ *ibid*

⁷¹ *ibid*

⁷² *ibid*; Figure 2

⁷³ *ibid* ; chapter IV, articles 15-33

between 3 to 6 months in addition to a fine.⁷⁴ Article 29 demands that the Courts impose maximum penalties in relation to offences committed by repeat offenders.⁷⁵ Furthermore, detainees sentenced to more than 5 years imprisonment are denied any right to apply for home leave⁷⁶ and drug trafficking offenders are prohibited from applying for probation or the suspension of their sentences, irrespective of the type of drug and the quantities involved or the circumstances of their offence.⁷⁷ According to UNODC, 'the principle that underlies the CNL is punishment.'⁷⁸ The punishment that is meted out is often in the form of lengthy prison sentences. Statistics published by the Supreme Court on selected decisions for the 8 month period between August 2008 and March 2009 reveal that 166 defendants were convicted of 'drugs narcotic crime' and convicted to a total of 1,756 years in prison, representing an average sentence of ten and a half years imprisonment per defendant (Table 6).⁷⁹

Drug trafficking offences result in mandatory prison sentences. Yet the majority of drug trafficking offenders that the law applies to in practice are couriers, paid small sums of money to transport drugs. It would not be unreasonable, for instance, for a courier to receive approximately \$500 for transporting more than 10 kilos of heroin, which carries a mandatory life sentence.⁸⁰ The draconian sentencing provisions in article 16, largely reduced to a simple consideration of the weight of the drugs that have been seized, allow little room for prudent judicial consideration relative to degree of criminal responsibility. There is no hope for leniency for a courier, irrespective of the extent of their involvement in the crime.

A number of interviewed experts have expressed concern over the CNL's sentencing structure. A CNT judge observed that the most serious problem with the law is 'the very harsh sentences that allows the judges no discretion.'⁸¹ A senior prosecution adviser reached the same conclusion, commenting that 'sentencing is robust and there is no real discretion.'⁸² According to a senior prosecutions caseworker at the CJTF the 'massive

⁷⁴ article 27

⁷⁵ article 29

⁷⁶ article 30

⁷⁷ article 31(2)

⁷⁸ UNODC, *Implementing Alternatives*, note 135, chapter 2, p.24

⁷⁹ Statistics available at <http://www.supremecourt.gov.af/decision/decision.html>

⁸⁰ interview, note 51

⁸¹ Questionnaire, CJTF Judge, 22.03.2009

⁸² interview, note 51

minimum sentences' provided for in article 16 represented 'hard law [and] bad law', the practical effect of which is that couriers receive lengthy prison sentences 'for effectively trying to get small amounts of money.'⁸³ There is no allowance for any balance between an offence and the suffering that should be imposed on an offender in order to secure justice. Ultimately, the CNL fails to provide an adequate level of proportionality between the nature of any drug trafficking offence and the degree of punishment that should be meted out, contrary to the recommendations of the UN Human Rights Committee.⁸⁴

In addition to concerns surrounding the tough sentencing provisions of the law, problems have arisen with the implementation of some of the 'new' procedures the CNL introduced. Article 41 provides incentives for apprehended and convicted drug offenders to co-operate with law enforcement agents, in return for which their sentences can be reduced by up to 50% on recommendation of the prosecutor in circumstances where an offender has provided 'substantial assistance' regarding the criminal activities of other suspects. This represented a new innovation for counter-narcotic law in Afghanistan, its rationale being that it should encourage offenders lower down the criminal chain, such as drugs couriers, to provide evidence against higher ranked drug offenders. No similar provision existed in the ICPC upon which the law enforcement authorities could rely.

Officials have, however, experienced difficulty in applying section 41, some of which stems from its lack of prescription. It fails to set out any clear process for dealing with any new information provided by co-operating defendants. The reasoning of the law was undoubtedly that there should be a referral to the CNPA or international authorities so that they can make enquiries as to the authenticity of the information provided and that, if it proves to be helpful, this would be noted in the trial bundle with a recommendation for sentence reduction if the defendant is convicted. The article, however, does not prevent the information being made available to the Judge before reaching a judgement, a matter for concern as it may influence their decision-making regarding a defendant's innocence or guilt and increase the potential for prejudicing judicial impartiality.

Section 41 also fails to provide any definition of 'substantial assistance' so this is rather unhelpfully left open to the subjective interpretation of Primary Prosecutors. Furthermore,

⁸³ interview, note 67

⁸⁴ UN Human Rights Committee: Australia, 24.07.2000, A/55/40, para's 498-528, available at www.unhchr.ch/tbs/doc.nsf/.../A.55.40.pparas498-528.En?

the English version of the law provides that the Primary Prosecutor has a discretion to recommend a sentence reduction of up to 50% so that the discount would be relative to the amount and value of assistance provided. The Dari translation, however, stated that any sentence reduction should be 50% in all cases, removing any room for judicial discretion.⁸⁵ The intended application of the article was initially, therefore, lost in translation, making it susceptible to inconsistent application by the judiciary, until a ruling by the Supreme Court clarified that sentence reductions are discretionary and up to 50%.⁸⁶

Aside from these problems, article 41 is open to abuse by offenders who, in the quest for sentence reductions, make false accusations against entirely innocent people, leading to their arrest. A CNT Judge commented that he did 'not like the Section 41 provision on informing on others as it provides an incentive to lie about people that you do not like and to get them in trouble with the authorities.'⁸⁷ An international expert also described the consequences of article 41 as 'a problem, a massive issue. The Sentencing Commission should be looking at it but do not have the personnel.'⁸⁸

Not only has article 41 led to the arrest of innocent people, the vital evidence against medium and higher-value drug traffickers that the drafters of the CNL might have anticipated would be forthcoming because of the incentives of sentence reduction has not materialised to the extent that was perhaps hoped. In practice, applications for section 41 sentence reductions are invoked infrequently by defendants. A prosecution adviser attributed the 'uncommunicative' behaviour of defendants to a 'cultural' predisposition towards inscrutability rather than any reaction to the presence of international actors in the investigative and prosecution process.⁸⁹ It is more likely, however, to be a direct response to threats to their safety and that of their families by personnel higher up the trafficking hierarchy. Higher-end drug traffickers are well aware of the potential dangers that article 41 might present to them and counter them by adopting 'scare and favour' strategies which include issuing threats of harm and offering financial rewards. The latter often involve ensuring that the courier's family are looked after and provided for during their detention. Threats of harm, on the other hand, can be far reaching, and can include killing

⁸⁵ interview, note 56

⁸⁶ *ibid*

⁸⁷ CJTF Judge, note 81

⁸⁸ interview, note 45

⁸⁹ interview, note 61

not only a courier's partner and children but also all of their blood ancestors.⁹⁰ These carrot and stick incentives have been successful in frustrating law enforcement agents from benefiting from the sentence reduction incentives provided for in article 41 and on the whole it has not proved greatly persuasive to couriers and lower-end targets, who remain the most likely to be arrested and convicted, to provide vital evidence against key target large-scale drug traffickers.

Article 37 of the CNL also introduced new procedures to counter-narcotic practices in Afghanistan and is one of the key centralising provisions of the legislation. It provides that upon the arrest of an individual with a quantity of drugs which ensures that the case falls within the jurisdiction of the CNL, the arresting officer must prepare a report and hand the accused over to the primary prosecutor of the district where the arrest took place within 72 hours. The accused must then be transported by the CNPA to its headquarters in Kabul within 15 days of the arrest where the suspect can be held for questioning for up to 72 hours. Within 15 days of the arrest the case should be handed over to a Special Counter Narcotics prosecutor who must present an indictment to the primary CNT or in the alternative seek a further extension of time of 15 days within which to do so.⁹¹ The effect is that suspects arrested under the CNL must be transferred to Kabul as soon as possible and no later than 15 days from their arrest.

Article 37 was designed to ensure that the administration of counter-narcotic justice would be funnelled to special Courts in Kabul staffed with specially trained judges and prosecutors cognisant with the law. The rationale behind this centralisation process was that it would enhance the potential for successfully prosecuting major drug cases and also help to ensure uniform application of the law. Suspects could be transported quickly from provincial areas to Kabul where their cases would be placed under the scrutiny of the Counter Narcotics Trust Fund (CNTF). Prosecution cases would be managed by a small and select group of trained individuals. Hearings would take place in the same courts and the judges presiding over them would be conversant with the law and procedure and would quickly build experience, ensuring consistency in application of the law.

⁹⁰ interview, note 51

⁹¹ article 37(9)

In reality, however, the article 37 provisions have proved very difficult to implement. Transporting suspects from provincial areas within the timescales the article prescribes presents major logistical problems. Transport infrastructure in Afghanistan is extremely poor. It has no functioning rail system, a limited and unregulated air transport industry and possesses one of the worst and least developed road systems in the world.⁹² The potential for complying with the provisions of article 37 and securing a transfer of drugs suspects within the prescribed time limits varies depending on where in the country an arrest is made. Different areas offer better or worse prospects for compliance, depending on available transport facilities. Rather than promoting the uniform application of the law in the manner that was anticipated by the drafters of the CNL, the difficult transfer requirements of article 37 decrease the potential for consistency. Afghanistan's poor transport infrastructure and the consequent problems the authorities have in transporting prisoners results in inevitable delays beyond the targets specified by article 37 of the CNL. A CNT Judge has admitted that 'many times people are kept for longer than their time limits',⁹³ representing worrying violations of defendant's rights to freedom from arbitrary detention provided for in the Afghan Constitution and under international conventions to which Afghanistan is a signatory.

The CJTF, with UK mentor assistance, has sought to solve the problem by airlifting prisoners from provincial areas to Kabul, often relying on assistance from the RAF.⁹⁴ This, however, has proved problematic because of the infrequency of available flights and the potential limited comparative priority airlifting prisoners may represent to the air force relative to ongoing military commitments. Whilst the UK and the Afghan government are understood to have been considering employing a private contractor to airlift prisoners, the sticking point has been the consequent costs that this would involve and agreeing on who should be required to meet them. The UK has so far been paying the costs of transporting suspects and the Afghan government is reluctant to contribute on the grounds that as the UK was responsible for the law it should be liable for consequent expenses.⁹⁵

Difficulties in organizing safe transport are not the only problems facing officials in their efforts to comply with article 37 requirements. Other variables affecting compliance include

⁹² *Afghanistan Millennium Development Goals Report 2005* available at <http://www.and.s.gov.af/mdgsgroups.asp>, p.xviii

⁹³ CJTF Judge, note 81

⁹⁴ interview, note 46

⁹⁵ interview, note 45

the degree of security in the area of arrest, the capacity of the police in the locality and their propensity to corruption. Most commonly, arrests take place when drugs are discovered during police or army checkpoints. Arrested individuals should be handed to the CNPA as soon as possible and the matter referred to the primary prosecutor within 72 hours, whereupon arrangements should be made for the transfer of the suspect to Kabul. Many cases, however, fail to be transferred either to the CNPA or Kabul due to police corruption.⁹⁶ There is provincial variation in compliance with the law. In Helmand 'the likelihood of anything happening [in Helmand] is not great. What is more realistic...is that a bribe is paid to the policeman or [the case] is simply not progressed because I suspect that the police don't know what they should do next and the security situation being what it is you are not going to worry about taking a guy who has got some [drugs] all the way back to see the prosecutor.'⁹⁷ On the other hand, there is perhaps an improved prospect of compliance in cases involving higher profile suspects, irrespective of the area of their arrest. On or about February 2010, for example, a policeman arrested by the CNPA in Helmand in connection with a trafficking operation was successfully transferred to the CJTF in Kabul.⁹⁸

In fact, 85% of cases received by the CJTF relate to offences committed in provincial areas,⁹⁹ so there is evidence to suggest that the authorities are overcoming logistical and security problems to comply with article 37. However, it is estimated that in approximately 30% of all cases presented to the CNT no defendants are produced.¹⁰⁰ In these instances drugs have been found by the police but they have made no arrests or, alternatively, the police have made legitimate seizures but allege that the suspects have escaped. These alarming statistics raise concerns about the prevalence of systematic police corruption. According to a UK prosecutions casework adviser the police are known to be complicit in profiting from the seizure of drugs in the course of their duties.¹⁰¹ In 2009 the CNT convicted a head of the Highway Police for assisting a drugs trafficker when he was found to have ordered his men to escort a drugs dealer.¹⁰² In some instances police officers will stop and search vehicles, locate and seize drugs in the course of their duties and then divide the drugs haul amongst themselves and the drug traffickers before allowing the

⁹⁶ interview, note 46

⁹⁷ *ibid*

⁹⁸ interview, note 61

⁹⁹ interviews, notes 67 and 61

¹⁰⁰ interview, note 67

¹⁰¹ *ibid*

¹⁰² CJTF Judge, note 81

traffickers to move on. Alternatively, they may accept a bribe to release a suspect. According to a CNT judge 'far too often, only the small fish are arrested and the big fish escape...often the police will let people go if they are paid enough money.'¹⁰³ In other instances police officers are known to have simply disappeared following a seizure of drugs, taking the drugs with them or the cash equivalent value having sold them back to the drug dealers from whom they were originally seized.¹⁰⁴

To some degree the potential for police corruption is increased as a result of omissions from the transplanted content of the CNL. Article 28(3), for example, states that vehicles seized in connection with trafficking offences can be confiscated and sold and that the sale proceeds should be deposited at the government treasury department. Yet the article fails to clarify who should be responsible for the seizure of assets and their sale or how they should account for the sale proceeds or indeed conduct a sale. This lack of prescription and clarity has led to *ad hoc* practices being employed by law enforcement officials and has enhanced their ability to profit without detection from corruption by disposing of seized assets and retaining the proceeds.¹⁰⁵

In addition to predatory corruption by the police and law enforcement personnel, the application of the CNL has also been compromised by the poor capacity of these officials and their lack of understanding of the law, particularly at the investigative phases of drug cases. Article 38 stipulates that officials who conduct drugs seizures should prepare reports that include details of the type and quantity of the drug and a factual account of the seizure. Any seized drugs should be handed over to the CNPA who gather physical evidence of the amount and weight of the drugs and take samples which are referred for testing, following which the remaining drugs are to be destroyed.¹⁰⁶ The scene report on drug seizures is a vital part of prosecution evidence and collected samples should represent a key feature of police investigative work.

Cases that originate in Kabul have an improved success rate because the police in Kabul handling the initial stages of the case are more likely to have received proper training in the conduct of the investigation of drug cases than those in provincial areas. A 2008

¹⁰³ *ibid*

¹⁰⁴ interview, note 67

¹⁰⁵ *ibid*

¹⁰⁶ article 39

UNODC report recorded that the CNPA in Kabul, which it described as a 'competent, albeit small, organisation,' was then conducting police investigations 'at a level capable of assisting legal proceedings.'¹⁰⁷ Cases originating from the provinces, however, often have to be dropped because the evidential chain has been broken due to poor police practices. No witness statements will have been taken; the police will have compiled incorrectly completed or inaccurate reports of drug seizures; samples taken from a small percentage of the haul may be mislaid without any other physical evidence of the seizure having been obtained, resulting in the case being removed from CNT jurisdiction to the Provincial Courts because the amount of drugs taken from the samples is less than that required for the CNT to have jurisdiction for prosecuting the case.¹⁰⁸ A CNT judge has confirmed that 'sometimes we have to send cases back to the provincial courts because the drug amount is too small.'¹⁰⁹ It is the experience of the same judge that 'the prosecutors are good at applying the law but still need to try to investigate the case further. Sometimes pressure is put upon prosecutors to continue with bad cases because a senior person does not like the accused. The police do not send proper scene reports or information on the destruction of the drugs as according to the law. The police are very ignorant and lazy and do not care for obeying the provisions of the law.'¹¹⁰ In some instances also the CNPA fail to destroy seized drugs are not after samples have been taken, in contravention of article 39. This may be simply because there are insufficient funds to organise a drugs burn but is often suspected to be the result of corruption and profiteering on the part of the police.¹¹¹

It is clear that problems with the capacity of the police, including the CNPA, are hampering the successful application of the CNL, an issue highlighted by UNODC in 2008 report when it described the CNPA in general as 'not yet a competent and independent police agency.'¹¹² While the poor capacity of the police is affecting the application of the CNL, the same can also be said of the defence service. The CJTF in Kabul is reasonably well supported by capable defence lawyers approved by the Supreme Court who receive mentoring assistance.¹¹³ Judges presiding over cases in the CNT in Kabul are known to be very thorough in checking whether someone is represented and they will stop a case to

¹⁰⁷ UNODC, *Thematic Evaluation*, note 135, chapter 2; by April 2011 there were 2,500 CNPA officers; <http://www.fco.gov.uk/en/global-issues/conflict-prevention/afghanistan21/counter-narcotics>, p.12

¹⁰⁸ interview, note 46

¹⁰⁹ CJTF Judge, note 81

¹¹⁰ *ibid*

¹¹¹ interview, note 67

¹¹² UNODC, note 107, p.12

¹¹³ interview, note 46

allow representation to be obtained if it has been requested.¹¹⁴ In an effort to ensure availability of defence representation some NGO's based in Kabul provide defence lawyers, operating a system similar to a duty solicitor referral scheme, so that there is a defence counsel on duty each night who can dispense advice and offer to represent a defendant charged with a CNL offence. The CJTF also endeavours to make a telephone available to suspects when they are brought into custody in Kabul in order that they can call a defence lawyer.¹¹⁵ However, this extent to which this service is available, particularly during the night, is questionable.¹¹⁶

Because of these practices it is likely to be the case that there are more defence lawyers available to represent defendants involved in drugs cases under the jurisdiction of the CNT than there are available to suspects in other criminal offences outside CNT jurisdiction. According to a senior prosecution adviser, 'you would probably see more defence lawyers in the drugs cases than you would elsewhere.'¹¹⁷ Nevertheless, in spite of these efforts, approximately 30% of cases listed for hearing at the CNT are adjourned because defence lawyers have failed to attend to represent their clients, contributing to a chronic backlog of cases and lengthening the period of time that defendants have to remain in prison awaiting trial.¹¹⁸ This backlog is often exacerbated by the prison department in Kabul neglecting to produce defendants for hearing, the net result of which is that only about one third of listed cases at the Tribunals in Kabul proceed to hearing.

The delays to proceedings caused by the unavailability of defence practitioners, or indeed by the failure of the prison service to produce parties for trial, may result in worrying breaches of fundamental rights to persons deprived of their liberty which are enshrined in international law to which Afghanistan is a signatory which provide that an accused should be entitled to a trial within a reasonable period of time¹¹⁹ and that criminal trials should be held without undue delay.¹²⁰ Such delays to the trial process also run contrary to Islamic law which acknowledges the right of an accused to a trial without undue delay.¹²¹

¹¹⁴ *ibid*; and interview, note 67

¹¹⁵ interview, note 46

¹¹⁶ *ibid*

¹¹⁷ *ibid*

¹¹⁸ interview, note 67

¹¹⁹ ICCPR, article 9(3)

¹²⁰ *ibid*, article 14(3)

¹²¹ Max Planck, note 170, chapter 3, p.76

5.4.2. The extent to which the CNL is considered meaningful and appropriate

The established legal order in terms of counter-narcotics criminal justice in Afghanistan has been influenced by an eclectic mix of customary practices, religious and positive state law. As a consequence of the historically tenuous reach of the Afghan state religious and customary practices are more influential than state legislation in shaping the established legal order and local attitudes towards drugs. Therefore, the extent to which the provisions of the CNL are compatible with customary and religious approaches towards narcotics is significant in determining its potential for being welcomed as meaningful and appropriate by the local or indeed the legal population.

Customary and religious practices appear to be characterised by an ambivalent mixture of prohibition and toleration. According to MacDonald 'both opium and hashish are generally tolerated by Afghans but the attitudes towards them are not written down in any way. There is quite a liberal attitude towards it.'¹²² In some northern provinces opium use is considered to be an integral aspect of social existence and an acceptable form of medication and, indeed, child-care.¹²³ According to Lau at the customary level 'the use of drugs is strongly condemned but no one has the right to take steps against, or even question, a person accused of using drugs.'¹²⁴ Under Islamic principles opium cultivation has been *haram* (forbidden) while also subject to an agricultural tax (*ushur*) imposed by mullahs, allowing for interpretation by farmers as religious toleration.¹²⁵

It is noticeable that the limitations that the CNL places on judicial decision-making as regards sentencing are similar to the simplified rules for sentencing for *Shari'a hudud* offences which are prescriptive and allow no discretion concerning punishment for an offence provided strict evidential requirements have been fulfilled. To that extent there is some degree of compatibility between the CNL and *Shari'a*. Nevertheless, the CNL's lack of tolerance towards drug cultivation, use, production and trafficking together with its strong emphasis on punishment as opposed to rehabilitation are generally incompatible

¹²² interview, International Drugs and Development Adviser, 02.12.2008.

¹²³ UNODC, note 78, p.68

¹²⁴ Lau, note 72, chapter3, p.17

¹²⁵ UNODCCP, *Global Illicit Drug Trends 2001*, available at http://www.unodc.org/pdf/report_2001-06-26_1/report_2001-06-26_1.pdf, p.33

with customary and religious attitudes towards narcotics which continues to influence approximately 80% of the population. Therefore, the CNL is unlikely to be considered meaningful and appropriate by the vast majority of the population who continue to refer to Islamic and customary practices rather than those imposed by the state.

According to a CNTF Judge, however, the procedures and practices laid down by the state and embodied in the CNL are much more appropriate for combating drug crime in Afghanistan than those prescribed by the country's other legal traditions. This Judge asserts that 'there is little dispute amongst the law enforcers that the only way to deal with the evil of drugs is through the laws. We need laws that people can understand to fight against the scourge of drugs. If rule of law means everything, then the laws must be written down and [be] able to be understood by anyone who looks them up.'¹²⁶ This suggests that there is a clear understanding amongst those concerned with enforcing state law that positive laws such as the 2005 CNL are the most appropriate and meaningful method by which the State can seek to combat the drugs industry. Indeed, they are more appropriate than reliance on customary and religious rituals and norms. According to the same Judge, 'If there is a use for traditional justice, it should not be in narcotics because many think of drugs as a problem for foreigners. They would also be subject to pressure and bribery and make decisions based on what they know of the family.'¹²⁷ Furthermore, this Judge was clear that in his view drug crime 'should not be left in the hands of ignorant *shurahs* who make up their minds based on how they like the family of the people on trial.'¹²⁸ He also regarded the ability to punish offenders that the law provides as a much more meaningful and appropriate means of combating drug crime in Afghanistan than the toleration and reconciliation allowed for in customary practices, commenting that 'the *Pashtunwali* concentrates on reconciliation more than punishment which would not be appropriate for drugs.'¹²⁹

While it is probable that there is a consensus amongst law enforcement personnel that state law is more appropriate and meaningful for combating Afghanistan's drug economy than the rules and norms provided by the country's other legal traditions, the question remains whether the transplanted content of the CNL is compatible with the established

¹²⁶ CJTF Judge, note 81

¹²⁷ *ibid*

¹²⁸ *ibid*

¹²⁹ *ibid*

legal order as regards state law. This will impact on the extent to which it is likely, as a transplanted law, to be meaningful and appropriate to the practitioners applying it.

Some of the new measures the CNL transplant instigates certainly represent diversions from counter-narcotics legislative norms. Its provisions for search, seizure and covert surveillance and its referral of more serious drug trafficking offences to the CNT's in Kabul, for example, are new to Afghan state criminal justice.¹³⁰ Nevertheless, its stipulation that investigations, prosecutions and trials are to be conducted in accordance with the ICPC renders it compatible with Afghanistan's formal civil law legal tradition.¹³¹ Furthermore, its objectives are broadly similar to those contained in the 2003 law, also a legal transplant, and it continues a tradition performed by Afghan state rulers, evident since the early 20th century, of reforming state criminal justice by transplanting foreign-designed law. In addition, the CNL's fairly unforgiving sentencing structure is aligned with the 2003 law's imposition of severe sentences to punish narcotic crime. Fundamentally, however, it is consistent with the 2004 Afghan Constitution which confirms that 'the state prevents the production and consumption of intoxicants...[and] the production and smuggling of narcotics.'¹³² To a large extent then, the CNL is compatible with the established legal order as regards state law and while its modernising features may be inconsistent with previous state approaches to counter-narcotics they met a justifiable requirement for new investigative procedures to tackle increasingly sophisticated drug crime.

This compatibility should enhance the extent to which it is considered meaningful and appropriate by state law enforcers. However, there is evidence that this is not the case and that this is impacting on the manner in which it is being applied. The robust article 16 sentencing guidelines are regarded as problematic and inappropriate by legal personnel. According to a CJTF Judge the unfortunate result of article 16 is that 'too many people who are arrested are at the bottom of the gangs while the big traffickers get away leaving poor people to spend 16 years in Pol-e-Charki prison.'¹³³ The mandatory imposition of fines under the same article also appears to be regarded as inappropriate by the judiciary. It is rare for them to be imposed, which is perhaps not surprising, given that they are

¹³⁰ article 34

¹³¹ article 35

¹³² article 7(2)

¹³³ CJTF Judge, note 81

largely disproportionate to the ability of offenders to pay them.¹³⁴ The minimum fine that can be imposed for possession for personal use and drug trafficking under the CNL, for example, is 5,000 Afghanis,¹³⁵ representing more than 30% of average annual earnings.¹³⁶

The draconian sentencing guidelines of article 16 are not the only provisions of the CNL that practitioners struggle to find meaningful and appropriate for counter-narcotic crime. A former prosecutions caseworker adviser for the CJTF has observed that Judges at the CNT often rely on their own intuition instead.¹³⁷ At one trial 5 suspects were defending charges of possession under article 16. They had been stopped with a lorry containing 50 kilos of heroin and were facing life imprisonment if found guilty. Whereas a similar case in the UK might be expected to take a number weeks or months to complete, this trial was concluded within only 40 minutes. Three of the defendant's lawyers did not bother to attend court and sent their client's defences to the Court in writing. The Judge's were prepared to accept this and reach a decision on the evidence available to them.¹³⁸ This case is not unique. At another trial in November 2009 a panel of three Judges sentenced five people to a total of 55 years in prison following an investigation lasting more than six months which included telephone intercepts and forensic reports and a hearing lasting merely two hours in which they accepted only the opening statements from lawyers present and failed to allow for the cross examination of witnesses. The verdict was recorded the day after the trial without calling the Court into session.¹³⁹ Ruhullah Qarizada, President of AIBA, has also reported unsuccessfully defending a client at the CNT who was wrongly sentenced to 16 years in prison due to mistaken identity. Qarizada 'brought 50 people from [the accused's] village, the mullah, the district governor and five members of parliament who all said he was Mahmood, not Ahmad. One policeman who arrested him said he'd heard his mother call him Ahmad, so the Judge gave him 16 years in prison.'¹⁴⁰

An Afghan defence expert based in Kabul has confirmed that the Judges at both the CNT and the provincial courts presiding over drugs cases 'do not follow the law. They do not

¹³⁴ interview, note 61

¹³⁵ article 16(2)(i) and article 27(1)(c)

¹³⁶ estimated at US\$425 a year. \$1 is equivalent to approximately 43 Afghanis; UNODC, *Corruption in Afghanistan*, note 291, chapter 3, p.4

¹³⁷ interview, note 67

¹³⁸ *ibid*

¹³⁹ Starkey, J. 'Judges convicting to please West, say striking lawyers,' *The Times*, 28.02.2010

¹⁴⁰ *ibid*

use the CN law. They do what they want.’¹⁴¹ He claimed that ‘the judges just ignore the evidence, they don’t care...for example, when they arrest a person and find 2 kilos of drugs at the time of the search of his home, they sentence him on the basis that they found 10 kilos of drugs at his home. They do not consider the evidence.’¹⁴² In a further interview he stated that ‘there was a case involving 50 kilos of sugar found at a house. A man was arrested and sentenced to 16 years imprisonment on the basis that it was 50 kilos of heroin.’¹⁴³ This suggests that Judges are deliberately ignoring the provisions set down in the CNL 2005. According to one international expert the problem with the law is that it is ‘counter cultural’ for practitioners and that in relation to its application by judges and prosecutors ‘you are trying to introduce [the 2005 CNL] but they just don’t understand it as it goes against everything that they are used to.’¹⁴⁴

Judges, it would appear, are not properly applying the law because they do not consider it to be culturally meaningful and appropriate. This is also the case with respect to police and prosecutors. Part of the rationale behind establishing the CJTF was that it would enhance the prosecution of drug cases by bringing the police and prosecution together so that they could work as an effective team to investigate and prosecute cases properly. In practice, however, it has been very difficult trying to foster a working relationship between the prosecutors and the police.¹⁴⁵ The police may conduct initial investigations and refer cases to prosecutors within the time limits set down by the law, but they will often do this irrespective of the state of the evidence that has been gathered and whether or not it was obtained in compliance with the provisions of the CNL. According to a prosecution casework adviser interviewed in 2008, the ‘police do not understand that they need to give a caution,’ which he surmised was due to a ‘cultural’ lack of an acceptance that it should be required.¹⁴⁶ Moreover, a 2008 UNODC report noted that ‘many CNPA officers do not fully understand the concept of intelligence gathering, accurate recording and analysis and referral to other units and agencies.’¹⁴⁷ It concludes that the proper recording and

¹⁴¹ interview, senior Afghan defence lawyer, 25.04.2010

¹⁴² *ibid*

¹⁴³ interview, senior Afghan defence lawyer 09.05.2010

¹⁴⁴ interview, note 48

¹⁴⁵ interview, note 46

¹⁴⁶ *ibid*

¹⁴⁷ UNODC, note 107, p.12

gathering of intelligence by law enforcement personnel is often frustrated 'due to cultural reasons.'¹⁴⁸

An international prosecution mentor interviewed in 2008 confirmed that if the prosecution discover a break in the evidential chain which may be fatal to the prospects of a successful prosecution they are often reluctant to refer the matter back to the police for further investigation.¹⁴⁹ At the same time, the police are unenthusiastic about receiving instructions from prosecutors about how to conduct their investigations. According to a former member of the UK Drugs Team 'it is very hard to break down the barrier between the two. There is a constant... cultural conflict...where the police and prosecutors work together.'¹⁵⁰ Another international expert notes that at the CJTF 'the police and prosecutors just do not get on at all and the prosecutors, once they get [a case] don't actually refer it back to the police.'¹⁵¹ He concludes that 'so few cases are actually investigated properly [because] it is going against all sorts of cultural norms for the Afghans.'¹⁵² The same expert notes that 'from the judges down, they just don't understand what the law is there for and how to use it. It is contrary to everything they have done in the past.'¹⁵³

What can be concluded from these findings? It is probably fair to say that the extent to which the CNL is likely to be considered meaningful and appropriate to Afghans is directly associated with the reach of the formal system of justice. While the reach of the formal system remains limited to 10-15% of the population, only the same percentage of the population are likely to potentially regard the CNL as meaningful and appropriate for dealing with drug use, cultivation, production and trafficking in Afghanistan. For the majority of the population for whom Islamic and customary approaches continue to have more resonance than legislative rules imposed by the state, the CNL has, therefore, limited meaning. Indeed, an international expert confirmed that 'nationally, it is not known by many people.'¹⁵⁴ The punitive nature of the CNL, furthermore, may also be regarded as incompatible with customary and religious tolerance towards narcotics, and their emphasis on reconciliation and rehabilitation. This may adversely influence the potential for the CNL

¹⁴⁸ *ibid*

¹⁴⁹ interview, note 46

¹⁵⁰ *ibid*

¹⁵¹ interview, note 48

¹⁵² *ibid*

¹⁵³ *ibid*

¹⁵⁴ *ibid*

to be considered meaningful and appropriate to the sections of the population who refer to Islamic and customary practices.

Whilst acknowledging these problems, the CNL is largely consistent with the established legal order represented by formal state law. While this augers well for its potential for being considered meaningful and appropriate by Afghan legal practitioners and law enforcement agents, evidence suggests that on the contrary some police officers, prosecutors, defence lawyers and Judges struggle to apply the transplanted content of the law because they are 'counter cultural', removed from their experience of the established legal order and the norms and rituals which they might associate with counter-narcotic justice.¹⁵⁵ While this continues to be the case, it is likely to impair the application of the CNL and the potential for its acceptance as a legal transplant. According to an international Drugs and Development Adviser the CNL 'goes against their [legal actors] understanding of what is important and meaningful.'¹⁵⁶

5.4.3 CNL: The motivations for legal transplantation and their impact on its reception

There were significant international as well as domestic motivations for a new CNL in 2005. At the international level, the vast majority of opium being produced in Afghanistan was for consumption abroad at various American, European and Asian destinations for which the return of an opium-driven economy in the aftermath of the international intervention in 2001 had serious negative ramifications. Afghan poppy fields became the fastest-growing source of heroin in the United States.¹⁵⁷ Heroin-related death rates in Los Angeles increased by 75% between 2002 and 2005 and the overall US market for Afghan heroin doubled between 2001 and 2004.¹⁵⁸ Beyond the US, in Europe and Asia, according to the 2005 World Drug Report, opiates 'continued to be the main problem drug, accounting for

¹⁵⁵ According to Roder 'even though not explicitly, the justice institutions do exclude the prosecution of illicit drug production from their responsibility. There is a general consent that poppy cultivation is necessary for the economic survival of the provincial population and that any form of ...prosecution would endanger their existence,' Roder, note 80, chapter 4, p.11

¹⁵⁶ *ibid*

¹⁵⁷ *ibid*

¹⁵⁸ Therolf, G. 'Afghan heroin's surge poses danger in US' *Los Angeles Times* 26.12.2006, available at <http://www.latimes.com/news/local/la-me-heroin26dec26>

62% of all treatment demand.¹⁵⁹ In addition, the UK was under pressure to produce and implement a cohesive counter-narcotics strategy to honour its lead nation role and to add justification to its continued military involvement in Afghanistan since 2001, the result of national self-interest in disrupting at source the importation of heroin into Britain.¹⁶⁰ The UK and her international partners were keen to prompt the Afghan government to adopt a more proactive counter-narcotic strategy, now embodied in the Implementation Plan, the creation of the CJTF and the new centralised courts and which would be complemented by a new CNL. According to the former Head of the Rule of Law team at the British Embassy in Kabul in 2005:

‘the decision that was made in consultation with the Afghan government was that we would have a Central Tribunal and a Task Force to look at the drugs issue because in great parts of the country the government [did] not have reach. It did not have a formal justice system that was working. There were some areas where there were no judges and no prosecutors and because of the scale of the drugs problem it was felt necessary to have some sort of centralised control over the Afghan side with international mentors.’¹⁶¹

On the domestic front, there was a political awareness at government level that new initiatives and procedures would be required to combat drug crime and opium production.¹⁶² Without these measures opium cultivation, production and trafficking would remain a threat to the security of the country, represented by warlords, extremist terrorist groups and the emerging Taliban, all of whom were continuing to profit from the industry. At the government level also, there would certainly have been an awareness of the need to co-operate with international requirements for imposing new counter-narcotics measures in order to ensure continued financial support and the prospect of new funding pledges. According to an international expert interviewed for this research ‘for central institutions, what it is more relevant is that this [the CNL] has granted new pledges and other financial commitments...this is what does really matter.’¹⁶³

President Karzai, who passed the CNL by decree without parliamentary approval, may well have been motivated to introduce a new CNL primarily to appease and maintain

¹⁵⁹ UNODC, note 38, p.5

¹⁶⁰ Tony Blair confirmed in 2001 that it was within the UK’s interests to engage militarily in Afghanistan because it was the source of 90% of UK’s heroin; Osborne, P. ‘Afghanistan: Here’s One We Invaded Earlier,’ *Channel 4*, 31.05.2004

¹⁶¹ interview, note 46

¹⁶² In November 2004 President Karzai confirmed that tackling the drug trade would be a key priority for the new government. To underline this intent, at his election victory speech on 4 November 2004 he called on Afghans to join him on a ‘*jihad*’ against the opium trade

¹⁶³ Italian legal consultant, 17.11.2008

working relations with important international sponsors of the new administration, and particularly the US and the UK. The dependence on international assistance is a common occurrence for new governments installed in states seeking to emerge from conflict intent on enhancing rule of law. However, this dependence can create an unequal working relationship between local officials and international actors which can translate into international control of legislative reform, conducted by legal transplantation. This appears to have been the case with regard to the CNL. It was drafted principally by officials from the UK and the US who, in a similar vein to criminal justice reform programmes in East Timor and Kosovo, chose to rely on legal transplantation as a means for promoting legal change.

Developing the CNL by legal transplantation would mean that it could be drafted quickly, which was considered by the international donors assisting the Afghan government in counter narcotic policy-making to be a priority. The former Head of the UK Rule of Law team confirmed that ‘in order to deal with the drugs problem, which was an immediate threat to security and stability in the country, something needed to be fast-tracked in order to allow that to happen. So essentially a small criminal justice system was set up to deal with counter-narcotics.’¹⁶⁴

In addition to these considerations it seems clear that a key motivation behind the decision by international actors to transplant new law to reform Afghanistan’s counter-narcotics legislative framework was that of modernisation. There was a consensus amongst international agencies by 2004 that the 2003 law required revision.¹⁶⁵ According to one report although the 2003 law had been ‘a major step forward compared to previous legislation...it did not address the ‘working needs’ of drug law enforcement officials.’¹⁶⁶ It was intended that these needs would be met by modern investigative and counter surveillance techniques provided for in the 2005 law and designed to complement the new counter-narcotics strategy, enabling end-to-end centralised control of more serious drug trafficking cases. According to the former head of the UK Rule of Law team:

‘Life had moved on and Afghan law had not. Under the formal system what they were doing was going back to their Criminal Procedure Code of the mid-to-early 1970’s. The world had obviously moved on tremendously since

¹⁶⁴ interview, note 46

¹⁶⁵ UNAMA, note 33, p.7

¹⁶⁶ NDCS, note 34, p.45

then. So there were some elements of drug law enforcement and criminal justice that we know about in the outside world that (a) [the Afghans] had not experienced and (b) that had not been around when those laws were passed. If you go back to the Afghan law it simply did not have the tools in it to deal with the sophistication of the crime that now existed.¹⁶⁷

By modernising the counter-narcotics law, Afghanistan's international partners sought to improve the country's criminal law framework and enhance the potential for establishing rule of law. They were also, however, motivated by the concerns of their own domestic and foreign policies, which were intent on key issues such as promoting stabilisation in central Asia, developing counter-terrorism strategies and reducing the domestic importation of Afghan opiates. In seeking to meet both Afghan criminal justice and their own domestic needs the international drafters of the CNL engaged in a policy of modernisation by transplantation. However, in transplanting foreign legal concepts it resulted in a means of reform perhaps more concerned with conformity to international standards than with Afghanistan's dominant legal traditions. According to an International Drugs and Development advisor, 'the big thing from the international[s] is that...they want something sophisticated that mirrors their own and covers all aspects and...meets international conventions requirements. However, [the CNL] does not really show appreciation of Afghan society and tribal norms.'¹⁶⁸ As noted earlier, this was a form of modernisation which although compatible with Afghan state law was largely incompatible with customary and religious approaches to counter-narcotics and therefore unlikely to appeal to the majority of the nation. This has implications for the potential acceptance of the CNL and its potential for achieving its objectives. It is difficult to assess whether the CNL is promoting local antipathy towards the Afghan government but there is evidence that it is disliked and that its objectives are viewed by certain sections of the Afghan population as disconnected from the national consciousness. An international expert confirms that the Afghan 'parliament does not like the 2005 law because it was brought in by Presidential decree'¹⁶⁹ and a CNT Judge has commented that 'many think of drugs as a problem for foreigners'¹⁷⁰ rather than for Afghans. The former head of the UK Rule of Law team who was based in Kabul between 2005 and 2007 claims that the 'impression from the Afghan side is that it is foreign-imposed and they would probably say that it is more US-imposed perhaps because

¹⁶⁷ interview, note 46

¹⁶⁸ email correspondence, international Drugs and Development advisor 13.12.2008

¹⁶⁹ interview, note 61

¹⁷⁰ CJTF Judge, note 81

the US were more involved at the end point [of the drafting]. They feel that it is more international than Afghan.¹⁷¹

Reforms such as the CNL, motivated by modernisation and instigated by means of transplantation do not come with a guarantee of success. With the armies of the countries who helped to draft the law still present in the country and engaged in supervising the enforcement of the law it may also be regarded with scepticism as an externally-designed law intent on serving foreign interests, which may undermine its potential for being properly applied and accepted. It has been noted previously that modernising legal reform lacking the endorsement of nationalism is likely to lack legitimacy and struggle to be accepted by the local population. Furthermore, historical analysis of criminal justice reform in Afghanistan reveals that attempts by previous Afghan rulers to impose modernised state justice mechanisms on the rural population have not only failed but have also provoked considerable resentment towards the Afghan state.

5.4.4 The extent to which the CNL has achieved its objectives

The CNL 2005 has 7 stated objectives. It was designed to prevent the cultivation of specified illicit narcotic drugs¹⁷² and prescribe penalties for, amongst other activities, their illegal cultivation, production and trafficking.¹⁷³ It also seeks to regulate and control the production and processing of narcotic drugs, psychotropic substance and chemical precursors¹⁷⁴ and to coordinate and monitor the government's counter-narcotics activities, policies and programmes.¹⁷⁵ In addition the CNL aims to encourage the cultivation of licit crops,¹⁷⁶ establish treatment, rehabilitation and harm reduction services¹⁷⁷ and attract national and international assistance programmes in the fight against illicit narcotic cultivation, production and trafficking.¹⁷⁸

The basis of the law, affirmed in article 1, and arguably its main objective, is to provide the Afghan state with a legal framework for preventing the cultivation and trafficking of illicit

¹⁷¹ interview, note 56

¹⁷² article 2(1)

¹⁷³ article 2(3)

¹⁷⁴ article 2(2)

¹⁷⁵ article 2(4)

¹⁷⁶ article 2(5)

¹⁷⁷ article 2(6)

¹⁷⁸ article 2(7)

narcotic drugs, particularly opium poppy. During the period since it has been in force, however, drug production, cultivation and trafficking have continued to be conducted on an enormous scale and those profiting from the trade have been able to operate with apparent impunity. The annual levels of cultivation and production of opium poppy in each of the years since the law was passed in 2005 up to 2008 exceeded those of any of the previous years to 1994.¹⁷⁹ Indeed, the area cultivated and the amount of opium produced in the three years from 2006 to 2008 was more than that produced and cultivated during the preceding 6-year period from 2000 to 2006.¹⁸⁰ In 2007 193,000 hectares of opium poppy were cultivated, more than at any other time in the recorded history of poppy cultivation and production in Afghanistan.¹⁸¹ At the time of the law's introduction Afghanistan accounted for 89% of global opium production. By 2008 it had increased to 96%¹⁸² and it has remained at more than 90% since 2006.¹⁸³

There has, nevertheless, been some recent success in reducing opium cultivation. Nangarhar, the second highest opium-producing province in 2007, was declared to be poppy free by 2008. A 2010 report notes a 33% drop in cultivation over the previous 2 years.¹⁸⁴ Furthermore, the number of opium-free provinces in Afghanistan increased from 6 in 2006 to 25 by 2010.¹⁸⁵

It is difficult to fully assess the effect of the CNL on opium cultivation and whether production might not have increased more without it or, indeed, whether any of the recent inroads into poppy cultivation owe anything to its application and enforcement. A 2008 UNODC report suggested that recent poppy reduction was the result of 'good local leadership and bad weather,'¹⁸⁶ asserting that the impact of law enforcement and criminal justice initiatives on the reduction of poppy cultivation in 2008 had been negligible compared to that of religious and customary influences. It concluded that 'religious leaders, elders and *shura* deserve credit for becoming increasingly effective in convincing

¹⁷⁹ UNODC, *World Drug Report 2009* available at www.unodc.org/unodc/en/data-and-analysis/WDR-2009.html, p. 34

¹⁸⁰ *ibid*

¹⁸¹ UNODC, *Afghanistan Opium Survey 2008*, available at [http://www.unodc.org/documents/publications/Afghanistan Opium Survey 2008.pdf](http://www.unodc.org/documents/publications/Afghanistan%20Opium%20Survey%202008.pdf), p.vii

¹⁸² UNODC, note 179, p.33-34

¹⁸³ UNODC, *World Drug Report 2010* available at [http://www.unodc.org/documents/wdr/WDR_2010/World Drug Report 2010 lo-res.pdf](http://www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf), p.42

¹⁸⁴ UNODC, *Afghanistan Opium Survey 2010. Winter Rapid Assessment* (February 2010) available at [www.unodc.org/documents/frontpage/Afghanistan Opium Survey 2010 Final.pdf](http://www.unodc.org/documents/frontpage/Afghanistan%20Opium%20Survey%202010%20Final.pdf), p.1

¹⁸⁵ *ibid*

¹⁸⁶ UNODC, note 181, p.vii

farmers not to grow opium, not least because it is against Islam' and that counter-narcotic measures to build integrity and justice and ensure 'good governance, efficient administration and honest judiciary...have yet to gain momentum.'¹⁸⁷ A 2010 report maintained that market forces played the principal role in deterring farmers from opium cultivation and that in the south-western regions, where most of the country's opium is grown, low prices and low yields were the main reasons for farmers refraining from growing opium.¹⁸⁸ On the other hand, the same report notes that in the north-western provinces 61% of farmers refrained from growing opium in 2010 'because it is illegal',¹⁸⁹ so there is some indication that the legal framework established by the 2005 CNL is becoming increasingly recognised among the rural population in more stable provinces.¹⁹⁰ There is, then, some evidence of the law achieving its objective of preventing poppy cultivation, although this is largely influenced by varying degrees of regional security.

There is also evidence that the legal framework set up as a result of the 2005 CNL has achieved some creditable success in preventing drug trafficking. Drug traffickers have been successfully arrested, prosecuted by the CJTF and convicted at the central courts. Initially the CNT got off to a slow start when it was established. By April 2007 the Primary Court had received 42 cases but had only reached verdicts in 2 of them and the Appeal Court had received 60 cases but had failed to reach any decisions at all.¹⁹¹ However, there has been a rapid increase in case turnover and conviction since then and for the 3-year period between May 2005 and June 2008 the CJTF prosecuted 1,486 cases, resulting in the conviction of 587 defendants, 181 acquittals and the referral of 46 people to treatment centres. In the same period the CJTF reviewed 890 cases from other courts in Afghanistan resulting in the conviction of a further 968 individuals. By June 2008 a total of 1555 people had been convicted at the CNT for drug-related offences.¹⁹² As a result of these encouraging statistics the Afghan Attorney-General announced in December 2008 that the 'CJTF has had an excellent and successful performance towards disrupting the narcotics trade and bringing drug traffickers to justice.'¹⁹³ The successful arrest and conviction of

¹⁸⁷ *ibid*

¹⁸⁸ *ibid*, p.1

¹⁸⁹ *ibid*

¹⁹⁰ Mansfield, D. *Sustaining the Decline?: Understanding the Changes in Opium Poppy Cultivation in the 2008/09 Growing Season* (May 2009), available at <http://www.fco.gov.uk/resources/en/pdf/pdf21/drivers-report-0809>, p.2

¹⁹¹ UNAMA, note 33, p.33

¹⁹² Agahee, *Afghanistan is committed to bringing drug-traffickers to justice*, Criminal Justice Task Force Communications Directorate (2008), held on file, p.22

¹⁹³ *ibid*, p.32

drug traffickers continue. In 2009 278 cases were heard at the Primary Court and 299 defendants were convicted, representing an 89% conviction rate.¹⁹⁴ Between March 2009 and March 2010, the CJTF convicted a further 599 drug-traffickers.¹⁹⁵ A further 155 convictions were secured in the first quarter of the Islamic year 1389 (March 2010-March 2011).¹⁹⁶ The current conviction rate is 96%.¹⁹⁷

Undoubtedly, then, some progress has been made with regard to the CNL meeting its objective of preventing drug trafficking. Nevertheless, the positive achievements of the CJTF are tempered by the fact that the vast majority of the cases that it processes concern couriers at the bottom end of the trafficking industry rather than the controllers of the drug trafficking networks who are the priority targets.¹⁹⁸ The first key priority of the government's 2006 NDCS was to disrupt 'the trafficking networks' by 'targeting traffickers and their backers.'¹⁹⁹ There have been some occasional successes. According to the CJTF in 2009 'the number of cases involving middle or high-value targets ha[d] increased by over 300 percent in the last year to reach 10 percent of the total number of cases.'²⁰⁰ Between March 2008 and February 2009 the CJTF successfully convicted 26 medium-value targets, classified as those people directly above the couriers in drug networks.²⁰¹ This compares with 13 convictions of similar offenders in the previous 12 months.²⁰² Furthermore, Haji Abdullah, thought to be in charge of the country's third biggest drugs network, was convicted in 2009 following the submission of telephone intercept evidence, permitted under the CNL.²⁰³ Another leading figure in the drugs trade in Afghanistan, Haji Rashid, was recently convicted in the Appeal Court following an appeal for which he received a 20-year sentence and a US\$10 million fine.²⁰⁴ Another case involving a high-level drug trafficker was before the Courts in February 2010.²⁰⁵ According to the CJTF these cases

¹⁹⁴ CJTF statistics available at <http://www.cjtf.gov.af/>

¹⁹⁵ Motawekel, K.R., *Year 1388 ended with the convictions of 599 drug traffickers*, CJTF (05 April 2010) available at http://www.cjtf.gov.af/index.php?option=com_content&view=article&id=50%3Ayear-1389--599&catid=13%Atopics&lang=en

¹⁹⁶ CJTF statistics, note 194

¹⁹⁷ interview, senior member of Rule of Law team, ADIDU, London 31.03.2011

¹⁹⁸ interview, note 45. According to his expert the CJTF is concerned 'largely with low level cases and there is not much movement up the chain from that.'

¹⁹⁹ NDCS, note 34, p. 18

²⁰⁰ UNODC, note 284, chapter 3, p.140

²⁰¹ interview, note 67

²⁰² *ibid*

²⁰³ Boone, J. in 'Afghan Opium Baron Gets 20 Years as UK Anti-Narcotics Strategy Pays Off,' *Guardian* (11.08.2009) available at <http://www.guardian.co.uk/world/2009/aug/11/afghan-opium-baron-convicted>

²⁰⁴ interview, senior Rule of Law officer, ADIDU 09.02.2010. She could not comment on the nature of the case on the basis that it was *sub judice*.

²⁰⁵ *ibid*

demonstrate that equipped with the legal tools provided by the CNL ‘the Afghan government can now disrupt major networks.’²⁰⁶ Progress has been made, but it is slow. Abdullah and Rashid represent the first ‘high value’ targets successfully prosecuted under the CNL since its enactment 6 years ago.²⁰⁷

In spite of these successes, the percentage of cases successfully prosecuted concerning medium to high-level targets is, in reality, minimal, given that there are estimated to be between 800-900 mid and high-level traffickers in Afghanistan.²⁰⁸ Furthermore, there is also some concern amongst international observers that the number of cases that the CJTF receives has plateaued. It currently processes and prosecutes on average approximately 30 cases a month.²⁰⁹ In the 10-month period from March 2008 to January 2009, the CJTF dealt with 334 cases and a total of 370 defendants.²¹⁰ Between March 2009 and March 2010 the CJTF received 395 cases.²¹¹ Given the size of the opium economy in Afghanistan – estimated to be worth \$2.4 billion a year²¹² - it would not be unreasonable to expect the CJTF to receive and prosecute substantially more drug cases falling under the jurisdiction of the CNL and indeed, more cases involving higher-end drug traffickers. In fact, according to UNODC ‘the impact [of the CNL] on major drug traffickers and organised criminal groups has been limited and the seizures have been small compared with the vast amount of drugs produced.’²¹³

The CNL also included an objective to establish detoxification, treatment, rehabilitation and harm reduction services for drug dependent individuals.²¹⁴ In conjunction with this, article 27 provides that addicts may be referred to detoxification or drug treatment centres following medical examination. While the intent of the CNL was to treat drug addiction and encourage the reintegration of drug users back into society the prospect of successful rehabilitation following treatment is unlikely given a lack of social reintegration, aftercare measures and education programmes, which are not required to be provided by the law.²¹⁵

²⁰⁶ Boone, note 203

²⁰⁷ *ibid*

²⁰⁸ UNODC, note 200, p. 105

²⁰⁹ interview, note 67

²¹⁰ statistics available at <http://www.cjtf.gov.af/en/pr/18-march-12-2009.html>

²¹¹ Motawekel, note 195

²¹² UNODC, note 183, p.42

²¹³ UNODC, note 107, p.12

²¹⁴ article 1(6)

²¹⁵ UNODC, note 78, p.25

There are estimated to be more than a million drug users in Afghanistan and drug dependency is predicted to continue to increase.²¹⁶ Afghans are more vulnerable to becoming addicts because of the continuing conflict following 25 years of war, social and economic disruption and resulting chronic mental health problems of its population.²¹⁷ It is arguable, ironically, that the CNL actually contributes to Afghanistan's drug addiction crisis as the majority of the country's addicts start their drug habits in prison and the law's tough sentencing guidelines result in most drug offenders being punished by imprisonment. And so, according to UNODC, 'the CNL represents a prescription to ensure an ever increasing prison population and an ever increasing number of drug addicts.'²¹⁸

Some progress has been made in establishing drug treatment facilities. In 2002 there were only 2 drug treatment, rehabilitation and harm reduction services in the country.²¹⁹ By 2009 this had increased to 39, offering 495 residential places.²²⁰ The net result, however, is that less than 0.25% of Afghanistan's drug users can be treated each year with the current treatment amenities available.²²¹ There remains, then, a huge gap between treatment demand and provision and the objectives of the CNL to ensure the provision of appropriate treatment services, the reintegration of drug users back into society and the reduction of drug dependency are not being met.

The CNL also aims to prevent the trafficking of chemical precursors used in the refinement of morphine to heroin²²² and to attract international cooperation and assistance to combat precursors and narcotic trafficking.²²³ These objectives build on commitments expressed by the international community at a conference in Paris in 2003 to share responsibility for combating opiates trafficking from Afghanistan,²²⁴ later reiterated at a follow-up conference in Moscow in June 2006. The resulting 'Moscow Declaration' led to the

²¹⁶ *ibid*, p.68

²¹⁷ *ibid*, p.58

²¹⁸ *ibid*, p.25

²¹⁹ UNODC, note 107, p.35

²²⁰ UNODC, note 78, p.68

²²¹ *ibid*

²²² article 2(3)

²²³ article 2(7)

²²⁴ *The Ministerial Conference on Drug Routes from Central Asia to Europe*. Paris (2003). More than 50 countries and international organisations attended and agreed to work together to combat opiate drug trafficking deriving from Afghanistan. The partnership became known as the 'Paris Pact.'

establishment of cross-border consultative groups designed to share counter-narcotic data and coordinate technical assistance relating to the trafficking of opiates from Afghanistan in order to enhance trafficking prevention. As part of this process a consensus was reached that more attention should be paid to preventing the flow of chemical precursors into Afghanistan,²²⁵ as a result of which a Targeted Anti-Trafficking Regional Communication, Expertise, Training (TAR CET) initiative was launched under UNODC guidance aimed at targeting precursors used in the manufacture of heroin in Afghanistan. In addition, a UN Security Council resolution passed on 11 June 2008 called on Member States to step up their efforts to stop precursors being smuggled into the country.²²⁶

Following increased cooperation between member states and as a result of joint operations by countries within the framework of the Paris Pact and the Moscow Declaration successful seizures of precursors have been reported. Operation TAR CET was responsible for the seizure of 47 metric tons of precursors in Afghanistan and its neighbouring countries.²²⁷ It is doubtful whether these seizures would have taken place without the international assistance resulting from the Paris and Moscow conferences. Nor is it likely that the international community would be so forthcoming in lending assistance of this nature unless Afghanistan had a law such as the CNL 2005 criminalizing drug and chemical precursor trafficking, providing internationally approved classification and regulation of precursors and narcotic drugs and equipping enforcement agents with more modern counter-surveillance measures. To that extent it has had some success in meeting its objective of preventing the trafficking of precursors.²²⁸ The same might also be said in relation to its objective of attracting international cooperation and assistance. The UK alone spent £290 million between 2005 and 2008 supporting a number of counter-narcotics measures²²⁹ and committed \$US20 million between 2004 and 2011 specifically for the CJTF.²³⁰

²²⁵ Moscow Declaration, Second Ministerial Conference on Drug Trafficking Routes from Afghanistan ('Paris 2-Moscow 1'), Moscow, 26-28 June, available at https://www.paris-pact.net/upload/static/Moscow_declaration_2006.pdf, p.4

²²⁶ S/Res/1817 SC/9352, 11.06.2008

²²⁷ UNODC, note 179, p.37

²²⁸ In the first 50 interdiction operations in 2011 338 kgs of chemical precursors were seized and 58 suspects arrested; UKFCO, *January Progress Report on Afghanistan* (January 2011) available at <http://www.fco.gov.uk/en/news/latest-news/?view=PressS&id=558520482>

²²⁹ UKFCO statistics available at <http://www.fco.gov.uk/en/fco-in-action/uk-in-afghanistan/Counter-Narcotics/>

²³⁰ The UK pledged US\$12 million over the three-year period from 2004 to 2007; USIP, note 125, chapter 1, p.14. In April 2007 the UK committed to funding \$US 18 million from 2007-2011 for the CJTF; UNAMA, note 33, p.33

These advances have not been shared in relation to the CNL's objective to coordinate, monitor and evaluate the counter-narcotics activities of the Afghan government which is the provenance of the MCN. The Ministry consists of a number of departments set up in thematic lines to compliment the 8 pillars of activity under the NDCS 2006 and 6 working groups have been established to analyse the effect of counter-narcotic measures in relation to each pillar activity. It has, however, been described by an international expert as 'a huge mess.'²³¹ Its predecessor, the Counter Narcotics Directorate, had been reviewed in 2003-2004 and it had been recommended at that stage that it would be more effective in carrying out its remit of monitoring counter narcotics policy and strategy if it was made smaller and staffed with better quality people with higher salaries. Rather than following this recommendation, however, the Afghan government and the UK were culpable of creating a new Ministry that employed too many people, most of whom were on small salaries and incapable of doing their jobs.²³²

It is also the case that there is very little communication between the various departments who tend to focus only on their own areas of responsibility. UNODC found counter-narcotics law enforcement in 2008 to be hindered by a 'lack of trust between the various ministries [that] hinders the sharing of information.'²³³ In June 2009 an international expert maintained that 'the problem was and still is that the various departments are too territorial and just concerned with protecting their own empires and areas of responsibility.'²³⁴ In an effort to improve the capacity of the Ministry the UK has funded a £12.5 million project deploying task forces comprised of experts from the different areas with which the Ministry is supposed to be concerned which provide technical assistance to staff involved in the various pillar activity departments. In spite of these efforts, while the Ministry remains functional, it is inefficient and viewed with some distrust by the international community.²³⁵ It is not effectively co-ordinating the government's counter narcotic activities. Nor is it properly evaluating the implementation of the NDCS. In short, the Ministry is failing to carry out its mandate as set out in article 52 CNL 2005. It is worrying indeed that there is no competent state institution capable of evaluating national counter-narcotics strategies,

²³¹ interview, note 45

²³² *ibid.* It employed approximately 450 staff

²³³ UNODC, note 107, p.12

²³⁴ interview, note 45

²³⁵ *ibid*

including those for legislative reform, in a country that continues to dominate world illicit opium exportation.

Conclusion

There are certainly some positive points to note in relation to the CNL. Its transplanted provisions have been complimented by a CNT Judge who has described it as a 'good law in that it is straight-forward and easy to understand.'²³⁶ Blanchard argues that it 'clarifies administrative authorities for counter narcotics policy and establishes clear procedures for investigating and prosecuting major drug offences.'²³⁷ Some of its provisions are well drafted and it provides a comprehensive classification of narcotics in line with international conventions. There were also entirely understandable reasons for updating the 2003 law and introducing new investigative techniques to tackle increasingly sophisticated trans-national drug trafficking crime. Furthermore, the CNL succeeded in establishing a new legal framework which has helped to secure the conviction of medium and high-level traffickers.

Nevertheless, applying the evaluative test proposed in this thesis, the CNL has not been a successful legal transplant. The application of the law has proved to be problematic. Its tough sentencing regime emphasises the punishment of offenders rather than rehabilitation and fails to allow sufficient judicial sentencing discretion to enable appropriate proportionality between offences committed and the penalties that should be imposed. The result is that in many cases low-level couriers and drug users receive long-term prison sentences, with no prospect of parole, home leave or social rehabilitation and are incarcerated in prisons where drugs are readily available, increasing the risk of drug addiction. The drafters of the law failed to differentiate between low-level and medium to high-level drug offenders and prescribe appropriate penalties for each. On this note, UNODC has recommended an urgent need to reassess the drugs policy in Afghanistan and suggested that 'an approach which emphasises treatment and social reintegration of [low level drug traffickers and users], with hard penalties for [medium and high-level

²³⁶ CJTF Judge, note 81

²³⁷ Blanchard, note 25, p.116

traffickers] would appear to be a much more effective long-term strategy than the punitive policies which have recently been introduced.²³⁸

There are also concerns that the provisions of article 41 can lead to the arrest and trial of innocent people, wrongly accused by drug offenders motivated by the possibility of reducing their sentences. In addition, the exclusive competence conferred by the CNL 2005 on a single central narcotics tribunal for serious drug trafficking offences has created a number of problems. The concentration of power to institutions in Kabul increases the perception of a centre-instigated divide between Kabul and the provinces which can be counter-productive to the impact of new state law such as the CNL. Furthermore, logistical problems caused by the necessity of having to transfer suspects to Kabul have resulted in the law failing to be effectively and equally applied across the country. The feasibility of properly enforcing the CNL without infringing defendants' rights of freedom from arbitrary detention was not considered with any degree of adequacy by the drafters of the CNL or the authorities involved with it before it was passed by Presidential Decree and represents a crass disregard for fundamental human rights. While many defendants may not actually be aware of the jurisprudential safeguards against arbitrary detention, lengthy and unauthorized pre-trial detention can be regarded as fundamentally un-Islamic and a violation of protections on individual's freedom of movement provided by the *Shari'a*,²³⁹ fostering antipathy towards and the central government and its perceived foreign-influenced state laws.

The acceptance of the CNL is likely also to be affected by the extent to which it is considered to be meaningful and appropriate by those applying it. The government's October 2005 Justice for All strategy had called for new legislation to include counter-narcotic measures that should comply with international standards and Islamic principles but which should also seek ways of engaging with traditional justice systems.²⁴⁰ Yet the CNL, passed 2 months later, provided no such negotiation between Afghanistan's legal traditions and conformed primarily with international expectations.

²³⁸ UNODC, note 78, p.83

²³⁹ verse 67:15 of the Qu'ran states that 'it is He who has made the earth manageable for you, so traverse ye through its tracts and enjoy of the sustenance which He furnishes,' *Max Planck Manual on Fair Trial Standards*, note 121, p. 35

²⁴⁰ Ministry of Justice, note 204, chapter 3

Contrasting views on whether state legislation in the form of the CNL is the most appropriate means of dealing with drug production, use and cultivation in Afghanistan largely mirror the divisions between the legal traditions that make up Afghanistan's established legal order as regards counter-narcotics criminal justice. Afghan state actors interviewed for this research maintained that introducing and enforcing state law in Afghanistan is the most appropriate means of combating the drug trade.²⁴¹ However, for the large majority of the country who refer to religious and customary practices rather than those prescribed the state, the CNL has limited application or meaning. Moreover, the prospect of the CNL being considered meaningful and appropriate by this majority is reduced as a result of the incompatibility of its emphasis on punishment with customary and religious traditional approaches of reconciliation and tolerance.

While legislation in the form of the CNL might be considered the most realistic means of tackling drug crime in Afghanistan amongst adherents of its formal established legal order, and although the CNL is mostly compatible with Afghanistan's formal legal traditions, there is evidence that legal practitioners and law enforcement agents are failing to properly apply it precisely because they fail to find its provisions either meaningful or appropriate. The CJTF has experienced antipathy towards its attempts to change the established roles of the police and prosecutors to improve their implementation of the law because it goes against their cultural norms in terms of what they consider their roles should be. This can lead to poor investigative and prosecution practices compromising the successful prosecution of drugs cases.

In addition, defence lawyers regularly fail to attend hearings and some Judges ignore the provisions of the law when reaching judgments and apply *Shari'a* instead. It would appear that some of the transplanted provisions of the CNL are contrary to the understanding of many local legal practitioners of what is important and meaningful for counter narcotic criminal justice in Afghanistan, which impacts on their investment in the law and ultimately its application and potential acceptance. According to an international expert interviewed for this research the international actors responsible for drafting the law were aware of the these potential problems:

²⁴¹ CJTF, note 81; email correspondence with Shinkai Karokhail, Afghan MP 26.01.2010; interview with Afghan tribal chief and parliamentary candidate, 01.10.2009

‘These were sort of things that we talked about at the time and what we very much felt at that time was [that] they won’t be able to comply with this but we shouldn’t do something that is the dumbing down because this is as high as they will ever go. If you keep the bar high then at least you give them something to move towards but what there hasn’t been is the sort of support to actually get it acted upon, get it done by everybody, understood by everybody. It is across the board. It is from the judges down. They just don’t understand what the law is there for and how to use it... You have also got huge tribal and religious influences in there [and] they really don’t want to get involved in these sort of things. They just don’t understand it. It is contrary to everything they have done in the past.’²⁴²

The 2005 CNL has also failed to meet its objectives of preventing poppy cultivation and the trafficking of narcotic drugs and chemical precursors. Some progress has certainly been made. With assistance from international partners, precursors bound for heroin producing laboratories in Afghanistan have been seized. Furthermore, the CJTF has prosecuted cases leading to the conviction of more than 1500 drug traffickers since it was established in May 2005. Medium and high-level drug traffickers have been convicted, their convictions made possible because of the new counter surveillance and intelligence gathering provisions the CNL introduced. However, the impact of these successes on the drug economy in Afghanistan has been minimal and the CNL 2005 has not achieved its goal of preventing the cultivation and trafficking of opium poppy. Cultivation and production levels of opium poppy in the first 4 years following the passing of the law exceeded those of any previous equivalent period in Afghanistan’s history. Furthermore, it has failed to encourage the establishment of treatment, rehabilitation and harm reduction programmes and by and large the MCN has failed to effectively carry out its mandate under the CNL 2005 to monitor, coordinate and evaluate the Afghan government’s counter narcotic policies.

Many of the problems surrounding the law relate to issues which are part of wider social and political dilemmas affecting general rule of law reform in Afghanistan. A CNT Judge confirms that ‘the problem is not with the law but with the willingness to enforce the laws as they are written.’²⁴³ The deterioration of the security situation in Afghanistan since 2005 affects the delivery of the counter narcotics projects.²⁴⁴ There are also problems with regard to the capacity of the police, to the extent that a 2008 UNODC report concluded that ‘Afghanistan has inadequate and insufficient counter narcotics law enforcement

²⁴² interview, note 45

²⁴³ CJTF Judge, note 81

²⁴⁴ Wintour, P. ‘Opium economy will take 20 years and £1bn to remove,’ *Guardian*, 06.02.2008

capabilities to respond to the impact of the illicit drug trade.²⁴⁵ Police corruption is endemic and is thought to be the main reason that more cases are not being received by the CJTF.²⁴⁶ A CJTF Judge who convicted a head of highway police in 2009 has commented that in his experience ‘often the police will let people go if they are paid enough money.’²⁴⁷ It is not only the police who are corrupt, although corruption is considered to be more prevalent amongst the police than in other justice departments.²⁴⁸ According to the defence expert based in Kabul ‘there is a lot of corruption in the Counter Narcotics Courts amongst the Judges and the prosecutors. They do not always follow the law. They do what they want. There is corruption in both the provincial and the Counter Narcotics Courts.’²⁴⁹ In a further interview this expert claimed that in the context of counter narcotics cases:

‘The biggest people to get bribes are the police, then the Judges. Judges take bribes. There are two groups of Judges – one group does take bribes and the other does not. The police take the most bribes and let people go. Police, prosecution and Judges collude and get together and find a way to acquit. They will work out a solution for the defendant so that a case collapses or Judges are left with no alternative other than to acquit. The Judges who accept bribes will back each other up if there is any questioning about their decisions.’

The Ministry of Interior has been a notable source of corruption. In 2007 it was unable to account for up to 30% of foreign-donated funds and was staffed by personnel, approximately 80% of whom were thought to be benefiting directly from the drug trade.²⁵⁰ In 2008 it was estimated that between 25%-40% of all the civil servants working in the Afghan government were profiting from the illicit narcotic industry.²⁵¹ Indeed, the CJTF has confirmed that between 2008 and 2009 those prosecuted under the CNL ‘have included a provincial deputy head of the CNPA, senior civil servants, former Russian commanders and officers in the ANA, ANP, NDS and the Border Police,’²⁵² which dramatically illustrates the link between state corruption and the narcotics trade. This level of corruption continues to compromise the enforcement of the CNL, the application of which is further impeded by

²⁴⁵ UNODC, note 107, p.v

²⁴⁶ interview, note 56

²⁴⁷ UNODC, note 200, p.140 The chief of counter narcotics police in Nimroz province was arrested in 2009 in connection with assisting drug trafficking; see Boone, note 203

²⁴⁸ interview, note 143. This defence expert states that ‘the biggest people to get bribes are the police. The police take the most bribes and let people go.’

²⁴⁹ *ibid*

²⁵⁰ Kent, A. ‘Covering up for Karzai and Co.’, July-August 2007, *Policy Options*, 11-17, p.11

²⁵¹ Goodhand, note 276, chapter 3, p.409.

²⁵² UNODC, note 200, p.140

Afghanistan's poor travel infrastructure, insecurity and the limited reach of the state criminal justice system to provincial areas.

While recognising this, arguably some of the problems associated with the CNL are attributable to the fact that it is a legal transplant. This was a legal transplant motivated by a modernising agenda largely devised and implemented by international actors. The increased involvement of international actors in drafting the law undoubtedly led to the law becoming a legal transplant. But it also increases the potential for it to be perceived negatively as a 'foreign law.' The international countries responsible for drafting it were not only motivated by a requirement to fulfil their responsibilities to assist in the development of rule of law in Afghanistan. They were also concerned with protecting their own domestic interests best served by disrupting the Afghan opium economy. To do this they controlled the drafting process and the content of the law, which introduced more modern investigative techniques that conformed with westernised ideals for counter-narcotics legislation. Although it was compatible with the Afghan civil law tradition and the Afghan Constitution, it was inconsistent with Afghanistan's more dominant customary and religious legal traditions and approaches to narcotics. It is likely that this has adversely affected the extent to which legal practitioners find the law meaningful and appropriate, impairing the acceptance of the law. A more tolerant approach to drug offending advocating rehabilitation, allowing for non-custodial sentencing and distinguishing between low-level and medium to high-level offenders may have had a better prospect of acceptance. A defence expert interviewed in 2010 complained that the CNL 'is very strict. It is not benefitting the general public. It is bad for them and the country...for couriers it is not right.'²⁵³

It is likely also that the transplanted nature of the law, as well as continuing international support for enforcing it and supervising its application may well increase local suspicion that the CNL is nothing more than a foreign imposition. According to an international expert 'the external support given to the centre (CNT) may be counterproductive in that these legal practices may be discredited as Western impositions.'²⁵⁴ While it appears that in fact most of the population are unaware of the law, a legacy of the lack of reach of the

²⁵³ interview, note 143

²⁵⁴ Tondini, M. (2008) 'Ubi Maior, Ibi Ius: Assessing Justice System Reform in Afghanistan, ' held on file, p.173

state justice system, if it is regarded as a foreign imposition by those who are aware of it, this will undoubtedly have damaging repercussions in terms of its legitimacy and acceptance. The defence expert interviewed for this research in 2010 claimed that 'it is a foreign law, paid for by the US. Local people who have a little bit of knowledge about the law see it as a foreign law and as very strict and not appropriate for Afghanistan.'²⁵⁵ Ultimately, the CNL 2005 appears to emerge in Afghanistan as an unsuccessful foreign legal transplant, suggesting that it was unreasonable to develop this counter-narcotics law by means of legal transplantation.

²⁵⁵ interview, note 143

6 Conclusion

This study has set out to evaluate the ICPC and the CNL to determine whether it was reasonable for the legislators who drafted them to rely on legal transplantation in order to develop these laws when seeking to reform Afghanistan's criminal law framework and promote rule of law. In addressing this issue it seeks to contribute to debates on both theoretical perspectives of legal transplants as mechanisms for legal development and their practical limitations in post-intervention states.

As I have noted in Chapter 1, reform programmes undertaken following international peacekeeping operations and military interventions have reflected a consensus that promoting transitions from conflict to peace in post-interventionist countries is dependent on the establishment of the rule of law and that its development in turn requires functioning criminal justice systems and criminal law frameworks that comply with international standards of due process, fair trial and human rights.

According to the UN it is during the critical periods in the aftermath of conflict that international legal advisors have the greatest opportunities to 'set virtuous cycles in motion'¹ and develop effective criminal law frameworks conducive to establishing the panacea of rule of law. When seeking to fulfil these opportunities they have engaged in extensive programmes of legislative reform and, in the process, have often resorted to transplanting foreign solutions. Yet in the vital area of criminal law reform, identified by O'Connor, as 'the first necessary step for post conflict states on the road towards rule of law and human rights,'² what can the phenomenon of legal transplantation appropriately contribute? A critical issue of concern is whether legal transplants actually represent reasonable, effective and legitimate tools for legislative reform in these environments. Contrasting theoretical views on their value, feasibility and evaluation, conflicting UN recommendations during the last decade over their legitimacy, and a 'rudimentary'

¹ UN, *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, U.N. Doc. A/63/881-S/2009/304 (11.06.2009) available at <http://daccess-dds-ny.un.org/doc/UNODC/GEN/NO9/367/70/PDF/N0936770.pdf?Open+Element>, p.1

² O'Connor, note 5, chapter 1, p.527

understanding amongst international advisors as to their viability have not provided any definitive reassurance on their potential as mechanisms for affecting post-intervention criminal law reform.

What of their potential with regard to the ICPC and the CNL, two contemporary criminal laws developed by legal transplantation in post-intervention Afghanistan? Was it reasonable for these laws to have been developed in this way and what useful theoretical and practical lessons can be learned from this study? An examination in Chapter 2 of the historical use of legal transplants as mechanisms for promoting criminal justice reform and the range of motivational rationales for adopting them reveals that they have practical significance as tools for legal development to the extent that it could be considered natural for legislators to rely on them and, indeed, poor practice to ignore them. It would appear, then, that there is every justification in post-intervention law reformers, such as those responsible for the ICPC and the CNL, contemplating employing the legal transplant mechanism to bring about legal change.

Yet this 'transplant justification' does not translate to an easy conclusion that it must always be reasonable to adopt legal transplants, as evidenced by the 'disappointing' results of legal transplant projects during the law and development movement of the 1970's³ and other reported transplant 'failures' such as those that introduced plea-bargaining in Georgia and Moldova in the early 2000's.⁴ The reasonableness of developing a law by legal transplantation is tied to the determination of its success or failure and this requires the application of an evaluative test. The new and original test that I propose, elucidated in chapter 2, draws on both positive and socio-legal perspectives of legal development and suggests that the reception of legal transplants, such as the ICPC and the CNL, will be related to the extent to which they achieve their objectives and are accepted, affected in turn by the manner in which they are applied and the degree to which they are considered meaningful and appropriate. This test also insists that the motivations for relying on borrowed law as well as the identity of the motivators can affect both the process of making law by transplantation and its reception and it acknowledges that transplant reception will be conditioned by local contextual concerns. In recognition of this I have examined in Chapter 3 the legal traditions that shape criminal justice in Afghanistan

³ Brooks, note 92, chapter 1, p.2285

⁴ Reichelt, note 119, chapter 2; Alkon, note 15, chapter 2, p.44-45

and the progress of and unique challenges to capacity building and reform of the state justice sector, which undoubtedly have resonance for the reception of the ICPC and the CNL.

It has to be accepted that many of the problems surrounding the ICPC and the CNL are symptomatic of the huge challenges that the state criminal justice sector has faced since their inception. The poor capacity of legal personnel, the historically limited reach of the state system, corruption and continuing insecurity, all discussed in chapter 3, impact negatively on the potential success of these two laws. Perhaps when international reform and reconstruction efforts have had more time to 'bed-in' these negative effects can be reduced allowing for better prospects of successful transplantation. Turkey's transplantation of the Swiss Civil Code was assessed as being successful, after all, some 25 years after new legislation was enacted.⁵ Moreover, at the time of its introduction, Turkey possessed a generation of well-trained jurists. Typical of post-intervention states, this was far from being the case in Afghanistan when either the ICPC or the CNL was passed. As a UNAMA rule of law officer noted in 2007 'we are starting at a low point. 40% of judges have no legal training at all. So it will take time for the new generation to come through. In many respects the foundations have been laid in terms of education and it will take time for the newly trained generation of lawyers to come through and make a difference. It will take at least a decade.'⁶ It is likely therefore, that there will be a slower rate of progress in terms of legislative reform taking root in post-interventionist as opposed to non-conflict states, delaying the reception of any transplanted laws. According to Samuels:

'It is increasingly clear that a realistic timeframe for re-creating a working criminal justice system following serious armed conflict with formal courts, trained judges and a retrained police force is close to twenty-years. This is all the more true where the criminal justice system was never particularly strong or effective before the conflict, and it is even worse where new legal norms are sought to be introduced, or if there is little political will or weak local constituency support for the reforms.'⁷

On this basis it is arguable that it might be more realistic to evaluate whether the ICPC and the CNL have been successful legal transplants in 15 years time.

⁵ Beckstrom, note 83, chapter 1, p.582

⁶ interview, senior UNAMA Rule of Law officer, 17.10.2007

⁷ Samuels, note 16, chapter 1, p.18

While acknowledging that post-intervention environments may delay legal transplant reception what does this study reveal in the contemporary context of the ICPC and the CNL? In my view, it is clear, that on the issue of transplant justification there were compelling reasons for the introduction of both laws as part of the process of reforming Afghanistan's criminal law framework. A new criminal procedure code was required to replace a 40-year old law to and remove uncertainty surrounding applicable procedures and a counter-narcotics law was assessed as necessary to provide more appropriate techniques for investigating increasingly sophisticated drug trafficking operations and complement the government's 2005 Counter Narcotics Implementation Plan and the establishment of the CJTF and the CNT. Moreover, insomuch as new laws were deemed to be essential, those responsible for drafting them conformed to historical tradition when they decided to rely on legal transplantation as a development tool. As I have explained in chapter 3, since the beginning of the 20th century Afghanistan's various rulers and regimes have attempted to create a functioning state criminal justice system to augment and uphold the philosophies upon which their rule was based, and to do this they undertook programmes of constitutional and legislative reform which involving extensive legal transplantation. *Hanafi fiqh* was codified and transplanted into penal law and western substantive and procedural laws with a civil law tradition were also borrowed and transplanted into new penal and procedural codes.⁸ Transplanted legal solutions have certainly, therefore, been historically instrumental to the development of Afghanistan's state legal system.

In addition to this, at the time that the ICPC was drafted the UN *Brahimi* Report was encouraging dependence on transplanted foreign models. Although the *Rule of Law* report, which pre-dated the CNL, offered contrasting advice, it still advocated the necessity of ensuring that post-intervention countries should be equipped with effective legal frameworks in the form of modern laws⁹ consistent with international human rights norms,¹⁰ an objective with which the use of legal transplants could assist. In the context of transplant justification, therefore, when the ICPC and the CNL were drafted both historical domestic law-making guidelines and contemporary international recommendations for

⁸ For example Ammanullah's 1924 Penal Code borrowed provisions from the French Penal Code, as was the case with the 1965 Criminal Procedure Law and the 1976 Penal Code; Vafai, note 77, chapter 3

⁹ UN, *Rule of Law*, note 30, chapter 1, para. 30

¹⁰ *ibid*, para 6

post-intervention reform would have indicated that it would be understandable to rely on legal transplantation to prepare these laws.

What, however, of the reasonableness of developing these laws in this way, taking into consideration the proposed evaluative test? It must be acknowledged that there are indeed some successful aspects of the ICPC and the CNL which might suggest that it was reasonable for them to have been developed by transplantation. The ICPC provided the Afghanistan state justice system with a much-needed modern procedural framework for readily-available universal application by legal practitioners and law enforcement actors. Furthermore, its Italian-sourced provisions offered both a collaboration of civil and common law procedures not far removed from the mixed system of criminal procedure previously practiced under the 1965 Code and compatibility with the 2004 Constitution. Meanwhile, the CNL provided new techniques for investigating increasingly sophisticated drug trafficking operations, and it has been instrumental in securing the conviction of more than 1500 traffickers. In addition to this, legal transplantation has helped to ensure that the provisions of both laws met the imperative demand of compliance with international standards of human rights and due process, without which the ideal of establishing rule of law through law enforcement in Afghanistan would be unrealisable.

In spite of these accomplishments my evaluations of the ICPC and the CNL in chapters 4 and 5 reveal that neither can yet be considered a successful legal transplant. There have been significant problems with both pieces of legislation as regards their application, meaningfulness and objectives, many of which derive from their transplanted content. It is also apparent that the motivations for developing both laws by transplantation and the consequent process of their development have also moderated their reception.

The transplanted content of the laws have certainly had implications in terms of their application. I have noted in chapter 4 that the ICPC fails to allow for the review of the legality of any arrest and detention at the pre-trial stage until the first hearing and to provide sufficient pre-trial alternatives to imprisonment. It also omits any reference to bail applications. I have argued that these omissions and procedural inadequacies in its transplanted content increase the potential for inconsistent application of the law and for the arbitrary detention of defendants.

The transplanted content of the CNL, discussed in Chapter 5, has also impacted on its application. It contains an inappropriately draconian sentencing regime with limited allowance for judicial discretion relative to degrees of criminal responsibility. In addition, its insistence on the referral of cases to Kabul has created logistical problems that increase the potential for inconsistent application of its provisions and the arbitrary detention of defendants. Moreover, its concentration of power to institutions and foreign-trained professionals in Kabul may exacerbate the centre-periphery divide and the antipathy towards the central administration and its reform efforts which have historically adversely affected the reach, legitimacy and reception of state laws.

The transplanted content of both laws has also struggled to be considered meaningful and appropriate by those responsible for applying them and the Afghan public. The ICPC's strengthening of the role of the prosecutor at the expense of the police in a similar vein to the Italian Code creates confusion and mistrust between police and prosecutors, reducing the effective application of the law. Furthermore, its failure to definitively replace previous legislation affecting criminal procedure creates uncertainty and inconsistency in application. With regard to the CNL, its potential for being regarded as appropriate by the local population has been reduced by the incompatibility of its punitive sentencing provisions with the tolerance and reconciliation of customary and religious approaches to counter narcotic crime. Moreover, the referral of criminal matters to customary and Islamic justice authorities and the continued application by Judges of *Shari'a* in both the criminal courts and the CNT's since both the CNL and the ICPC were passed is indicative of their lack of resonance and meaning amongst local legal practitioners. Even if Tapper is correct in suggesting that Afghan culture is capable of absorbing new transplanted legal procedures, it appears that those offered by the ICPC and the CNL have failed to sufficiently connect to Afghan perceptions of 'justice' to foster the absorption that their draughtsmen might have hoped for.

With regard to the motivations for employing legal transplants to develop these laws, it is apparent from this study that they were largely the result of international as opposed to local demand and that the actors responsible for drafting them were motivated primarily for reasons of expediency and modernisation to adopt legal transplants. However, these motivations affected the law making process in the context of these two laws, resulting in

transplanted law that largely ignored the vital ingredients of local participation, local context and the plurality of Afghanistan's legal traditions.

The necessity of quickly producing suitably 'modern' law resulted in transplanted laws prepared by international actors following minimal local participation, with damaging consequences. The lack of consultation with Afghan officials during the drafting of the ICPC created resentment in the justice institutions and rejection by the Afghan National Assembly. President Karzai was nevertheless persuaded by his international partners to invoke his Presidential powers to issue both it and, later, the CNL to avoid delay and scrutiny by the *Taqnin*. In the case of the ICPC this was in the face of threats by the Italian government to withdraw funding for a number of justice projects. Such law-making processes can increase legitimacy-damaging local perceptions of international imposition.

The requirement for expedient, modern law also encouraged the adoption of legal transplants in the case of the ICPC and the CNL without sufficient reference to the social, political and historical context of Afghanistan's criminal justice system to test whether they would become or how they could be changed to become effective solutions. Indeed, the knowledge that the architects of the ICPC and the CNL had of Afghanistan criminal justice and legislative heritage is questionable,¹¹ a point to which the MOJ's 2005 Justice for All report was possibly alluding when it objected to the fact that 'very few foreign experts appreciate the uniqueness of Afghan law.'¹² Some historical research would have revealed that although positive codified state law was traditionally less significant to Afghanistan's rural communities than customary and *Shari'a* approaches to justice,¹³ there have been periods when the centralised state criminal justice system has been accepted even by the rural population and that this has been the case when the state legal system has absorbed all the country's legal traditions. The last legal system developed solely by the Afghans between 1964 to 1979, which witnessed the passing of the 1965 Code of Criminal Procedure and the 1976 Penal Code, was generally accepted by everyone from rural population to urban elite. The Court system was split between courts that applied religious

¹¹ interview, former senior Italian official 17.07.2008 who noted that Di Gennaro's knowledge of Afghan law 'was very limited.'

¹² Ministry of Justice, *Justice for All*, note 204, chapter 3, p.7

¹³ This was certainly recognised by international academics before the passing of the ICPC and the CNL. Barfield, note 196, chapter 3, p.437-443; Etling, note 38, chapter 2, p.14

law and those applying state law.¹⁴ Judges in primary courts would often refer matters to tribal village elders for resolution in accordance with customary law and incorporate their findings in their own formal decisions. According to Etling this period demonstrated that 'it is possible to mix Islamic and secular laws within one legal system, and ...such a system in Afghanistan increased the legal system's legitimacy and led to wide acceptance by the local population.'¹⁵ This semi-secular system of justice was accepted because it allowed for the inclusion of all of Afghanistan's legal traditions and for interpretation of rules and procedures by the legal authorities responsible in each legal tradition. Neither the transplanted ICPC nor the CNL, however, allowed for similar negotiations between these legal traditions, resulting in negative repercussions in terms of their reception.

In conclusion it would appear that it was not reasonable to develop these laws by legal transplantation. Their creation by foreign actors, their transplanted foreign content and the continuing international support for enforcing them and supervising their application has increased their potential for being regarded as foreign impositions intent on promoting centralisation based on western models at the expense of local requirements. This perception of the laws may damage not only their potential reception but also the legitimacy of the central government that has introduced them.¹⁶ They may even have the capacity to be lethally destructive to the welfare of the central state, particularly if they are regarded as representing a sufficiently serious threat to the religious authority of the *ulama*.¹⁷ The real concern for the Afghan government and its international supporters is that if the procedures that the transplanted content of the ICPC and the CNL provide are abused and wrongly applied by the actors responsible for implementing them, the consequential injustices that are perpetrated risk increasing local dissatisfaction with the state justice system and the appeal of alternative justice mechanisms, including those offered by the Taliban. The transplanted, international design of the CNL and the ICPC contributes to the injustices that they can cause. According to an Afghan defence lawyer, with respect to the CNL 'the judges and prosecutors get their salaries from the UK embassy so they just convict people [under the law] to keep them happy.'¹⁸ While these two laws were introduced to reform Afghanistan's criminal law framework and promote rule

¹⁴ *ibid*, p.11

¹⁵ *ibid*, p.12

¹⁶ Suhrke, note 42, Chapter 2, p.1293

¹⁷ Ahmed, note 263, chapter 4, p. 291

¹⁸ interview senior Afghan defence lawyer, 25.05.2010

of law, by becoming unsuccessful legal transplants applied inappropriately as vehicles for arbitrary arrest and detention, bribes and corruption, they create frustration and discontent with state criminal justice, capable of exploitation by the Taliban. To that extent, rather than driving justice, they can develop into catalysts for insurgency.

It is inevitable that the international community will engage in further military and humanitarian interventions followed by post-intervention efforts to promote the rule of law which, given the centrality of criminal justice to rule of law development, are likely to require both international and domestic advisors to consider what the most effective and reasonable means of developing new criminal law might be. This will remain a vital issue as the legitimacy of future interventions and consequent legislative reform programmes aimed at developing criminal law frameworks will be measured against the effectiveness of the laws that are subsequently introduced. What practical and theoretical lessons can be learned from this study that may have pragmatic resonance for future post-interventionist legislators?

On a theoretical level both laws refute Legrand's premise that legal transplants are impossible as well as perspectives such as Montesquieu's which advocate that it would only be *un grand hazard* for law to develop by legal transplantation. The CNL and the ICPC confirm that law can be developed in this way. In fact the development of both laws seems to support Watsonian optimism over the significance of the legal transplantation medium for promoting legal change. These legal transplants have practical utility. There is, however, a caveat to be applied to this assertion and that is that local contextual issues will impact on the success or failure of a transplanted law. As the evaluations of the ICPC and the CNL demonstrate, the reception of the ICPC and the CNL has been affected by the limited success of justice reform programmes implemented since 2001, by an insufficient commitment by the Afghan authorities to reform, and a failure to create a suitable environment in which rule of law can operate. In spite of significant international effort, good will and expense centred on reconstructing the state justice system genuine progress has been slow and difficult. Afghanistan's state criminal justice system continues to be constrained by a lack of sufficiently trained or appropriately educated staff, insufficient numbers of Judges and defence lawyers, a poorly developed legal aid scheme, inadequate investigation and prosecution practices, insecurity and corruption amongst the police, law enforcement personnel and the judiciary. These concerns as well as a lack of

real commitment amongst the current administration to ensure that rule of law prevails have challenged the reception of these legal transplants.¹⁹

The observation that local environmental issues have been vital conditioning factors for the reception of the ICPC and the CNL accords the views of theorists on transplant feasibility such as Kahn-Freund, Berkowitz and De Lisle all of whom have underlined the centrality of local context to the successful adoption of transplanted law. While none of their theories resulted from assessments of transplanted criminal law in post-intervention states they do in fact have resonance for legislation of this nature in these environments. The findings of this study accord with De Lisle's recommendation that transplanted law has a better prospect of successful reception if there is a close collaborative relationship between local and foreign legal experts and dependence on local expertise in the drafting process.²⁰ This was not the case with either the ICPC or the CNL, to their detriment. The experience of both laws also confirms Berkowitz's proposition that 'legal transplants may work if they are adapted or if the population is already familiar with the basic principles of these laws.'²¹ In spite of their consistency with the Constitution and with that state law civil tradition both laws contained procedures unfamiliar to the legal practitioners responsible for applying them. Familiarity can be enhanced through education and training but this is likely, particularly in the context of a post-intervention country such as Afghanistan, to take time. Without immediate familiarisation, there is always the possibility of success through adaptation. However, adaptation also requires time. Berkowitz's theory was based on the assessment of legal transplants, the majority of which were introduced in the 19th Century, allowing for more than 100 years of potential adaptation. There has been some evidence of adaptation of the ICPC through the work of PRT's and referral of minor criminal cases to *jirgas/shuras* in accordance with the recommendations of Wardak and the 2007 HDR. Any potential future adaptation of these laws will take more time and will be dependent on local commitment to the overall development of rule of law.²²

¹⁹ See Mertus, note 2, chapter 1, p. 1382; Deladda, note 218, chapter 4. Deladda comments that in 2008 'the Afghan leadership's lack of interest in justice issues' was affecting international reform efforts and that 'if they were not sidelined altogether, the already limited number of qualified professionals within the justice institutions was not motivated to pursue serious reform;' p.10. In addition, a CJTF senior prosecutions adviser interviewed in 2009 stated that with regards to counter narcotics and corruption he did 'not get the feeling that there is much will on behalf of Afghan authorities.'

²⁰ DeLisle, note 26, chapter 2, p.179-308

²¹ Berkowitz et al, note 51, chapter 2, p.189; Tondini has also argued that 'in order to generate a relatively strong popular demand for legal and judicial services, justice system reform has to adapt to the local conditions or contain principles already familiar to the local population;' note 201, chapter 3, p.92

²² Carothers, note 1, chapter 1, p.96-105

The findings from these current evaluations of the ICPC and the CNL demonstrate that there is a significant inter-relationship between law and the society it serves and caution against Watsonian bias in favour of transplant feasibility. They should serve as a warning for post-interventionist law reformers facing the critical dilemma of how to appropriately create new criminal law to look beyond the comfort zone that Watson's theory might offer them on the value of legal transplants as tools for affecting legal change and its implication that they need always look no further than to tried and tested models from other jurisdictions. In fact, Watson's bias promotes a uniformity of decision-making for law reformers without due consideration of contextual issues which might detract from the legislation's success. More than this, it encourages a pre-disposition towards legal transplants as tools for legal change without proper recourse to relevant extraneous concerns. In this respect it is difficult not to agree with some of Watson's critics who have suggested that his premise on legal development is too one-dimensional.²³ His favouritism towards the transplant mechanism endorses a myopic strategy of law reform that ignores crucial factors such as evaluation, the impact of transplanting law on receiving jurisdictions and the prospects of reception. Legal reform policy based on Watsonian perspectives on legal transplantation runs the risk not only of introducing law regarded by receiving populations as inappropriate and therefore predestined to fail, but also of provoking local resentment and anti-governmental sentiments,²⁴ which are prospects of increased concern in more extreme reform situations, such as those related to criminal law reform and rule of law promotion in post-intervention states.

On a practical level the following lessons emerge from the evaluations in this study of the ICPC and the CNL that should have relevance to law reformers engaged in criminal law reform in future transitional states. Firstly, there is every justification in considering that legal transplants can be engineers for developing criminal law frameworks in post-intervention states. Secondly, sources for readily-available transplantation, such as the Model Codes for Criminal Procedure, can be useful reference points for ensuring the introduction of modern law that will comply with international human rights norms. According to a UK senior prosecutions adviser formerly based in Kabul 'It is fantastic to be able to use something as a quasi-template, talk to Afghans about it and see how it

²³ Legrand, note 71, chapter 2, p. 60

²⁴ Ahmed, note 17, p.291

interacts with the principles that they think should underpin [it].²⁵ However, the Model Codes, as their authors now acknowledge, should only be used for inspiration for legislative material that can then be assessed for ‘sensitivity’ rather than as tools for producing ‘bolt-on’ laws which ignore these issues.

Thirdly, it should not be assumed that it is always reasonable to rely on legal transplantation to prepare post-intervention criminal law. The reasonableness of developing legislation in this way demands prior assessment. Legal transplants are more likely to be considered effective and, indeed, reasonable mechanisms for reform if they are employed in ways that are sensitive to the environment of the adopting country. ‘Sensitive transplanting’ should improve the legitimacy and reach of the resulting laws and requires full and proper consideration of a number of constituent issues, namely:

- a) an in-depth knowledge of theoretical perspectives of legal transplants, as elucidated in Chapter 2, which should provide a valuable insight on the legitimacy and constraints of legal transplants as tools for legal change and on the conditioning factors for their success;
- b) a full appreciation of the history and legal traditions of the criminal justice system of the adopting post-intervention country in order to determine what kind of legal changes – including those brought by transplantation – might be achievable and sustainable and how they might be supported;
- c) suitable reflection on the potential successful reception of the transplanted law before its implementation. In this respect I recommend adopting the evaluative test outlined in Chapter 2 to ensure advance assessment of the way in which it will be applied, whether it will be considered meaningful and appropriate and the potential for it achieving its objectives so that vital judgements can be made not only on whether the proposed transplanted content is appropriate but also on the critical issue of how institutional reform can be synergised with legal reform to facilitate the reception of the law. This approach sits comfortably with Stromseth’s ‘synergistic’ framework for rule of law development, allowing for suitable contemplation of appropriate levels of articulation between codified and traditional law;

²⁵ interview, UK senior prosecutions advisor, 25.06.2008

- d) an awareness that the motivations for adopting transplants can have consequences for the process of their development and success. The requirement for expedient and modern laws calls for cautious law-making that does not ignore vital local expertise and consultation and that acknowledges that foreign-inspired provisions are more likely to have valuable local legitimacy if they resonate with local legal traditions. In this respect countries with plural legal traditions, such as Afghanistan, demand particular sensitivity;
- e) finally, an acknowledgement that legal transplantation lacking appropriate sensitivity in such countries may, as the ICPC and the CNL demonstrate, result in unsuccessful and potentially 'lethal' legal transplants that, rather than promoting justice, create injustices and undermine the establishment rule of law, the fundamental concern upon which transitions from conflict to peace and stability depend.

Sensitive transplanting requires all the elements referred to in items (a) to (e) to be satisfied. It is proposed that post-intervention criminal law reformers should always be equipped with a full appreciation of the issues outlined in items (a), (d) and (e) and that before they embark on post-intervention law reform involving legal transplants in any particular country they should undertake the tasks referred to in items (b) and (c). Compliance with these processes will ensure a sensitive transplanting outcome.

Legal transplantation is, as Twining has pointed out, 'a pervasive aspect of legal experience',²⁶ a practical mechanism capable of providing solutions for legal change; capable, as exemplified by the ICPC and the CNL, of facilitating the incorporation of international human rights and due process ideals and internationally-recognised procedures into new post-intervention criminal legislation. Yet while legal transplantation is pervasive as a reform tool it may not always be the most reasonable means of promoting legal change. The pervasiveness of legal transplantation should not lead reformers to easy presumptions of its universal suitability when searching for law-making solutions. In the vitally important area of post-intervention criminal law reform, legislators should be cognisant of its limitations and 'lethal' potential and recognise that the reasonableness of relying on legal transplantation will depend on the sensitivity with which it is applied,

²⁶ Twining, note 78, chapter 2, p.51

requiring a full appreciation of legal transplant feasibility, local legal traditions and the prior application of the proposed evaluative test to assess potential effectiveness. While legal transplantation is likely to remain a pervasive aspect of post-intervention criminal law development it is more likely to be a reasonable and successful aspect of future legal experience in this field if it is employed sensitively as a mechanism for reform.

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Appendix 1: Afghanistan: society, conflict and context to 2001 and constitutional and legal institutional reform under the Bonn Agreement

Afghanistan is a land-locked country bordered to the west by Iran, to the north by Turkmenistan, Uzbekistan and Tajikistan and to the east and south by China and Pakistan. Its current population of 25.5 million,¹ divided among its 34 provinces, consists of Pashtuns, representing approximately 44% of the total population, Tajiks 25%, Hazarah 10%, Uzbek 8% with the remaining 13% composed of a variety of Aimak, Turkmen, Baluch, Brahui, Nuristani, Pashaie, Pamiri, Mongols, Arabs, Gujars, Kohistanis, Wakhs, Jats, Kirghiz and Qizilbash.² While ethnically diverse, the Afghan population is united in its devotion to Islam. Approximately 99% of the population are Muslim,³ the remaining 1% non-Muslim communities being comprised of Hindus and Sikhs.⁴ Of those adhering to the Muslim faith, 80 to 85% are Sunnis while the remaining 15 to 20% are Shi'a Muslims.⁵

Its geographical positioning has acted as a magnet for empire builders and colonial expansionists intent on variously promoting trade links to its neighbouring countries, creating a buffer state to protect colonial concerns or aligning its political ideologies to conform with their own to establish a central Asian ally. In this way it has attracted military intervention most recently from the British in the 19th and 20th centuries, the Soviet Union in the 1980's and the United States in 2001.⁶ Since 2001 it has become a focal point for the US and the UK in their 'war on terror.'

¹ Islamic Republic of Afghanistan Central Statistics Organisation Statistical Yearbook 2009/10 available at <http://www.cso.gov.af>, p.5

² Situated at the 'crossroads' of central Asia, it was an important staging post on the 'Silk Road', attracting trade and the interest of people from different civilisations, helping to define the composition of its multi-ethnic population. See Wardak, A. 'Building a post-war justice system in Afghanistan,' (2004) 41, *Crime, Law & Social Change*, p.319-341, p.321. There are thought to be approximately 30 different languages spoken amongst the population, although Dari and Pashto are recognised as the two most widely used and also as the country's official languages. See Rahimi, R. *Afghanistan: Exploring the Dynamics of Sociopolitical Strife and the Persistence of the Insurgency*, (2008) Pearson Peacekeeping Centre Occasional Paper 2 available at http://www.humansecuritygateway.com/documents/PEARSON_Afghanistan_DynamicsSociopoliticalStrife_PersistenceInsurgency.pdf, p.6

³ Rubin, B.R. (1995) *The Fragmentation of Afghanistan. State Formation and Collapse in the International System*, Yale University Press; p.38

⁴ Mendoza, K (2004) *Islam and Islamism in Afghanistan*, Islamic Legal Studies Program, Harvard Law School, available at <http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf>, p.5

⁵ Wardak, note 2, p.325

⁶ Previously from Alexander the Great in 330 BC, Genghis Khan in the 13th Century, Tamerlane in the 14th Century, the Moghuls in the 16th and 17th Centuries and the Persians in the 17th and 18th Centuries; See Vafai, G.H. *Afghanistan. A Country Law Study*, Washington, Library of Congress Law Library (1988), p.3-4

The Soviet invasion in December 1979, the subsequent civil war following the Soviet withdrawal and the period of Taliban rule have had far reaching consequences for the social and economic fabric of Afghan society and for Afghanistan's capacity for advancing human development, the effects of which are still relevant to the application of criminal justice in contemporary Afghanistan. The period of Soviet intervention lasted for ten years. In the local arena Afghanistan became embroiled in a guerrilla war between Soviet forces and Afghan *mujahedeen* resistance fighters, comprised of an amalgamation of previously fractious ethnic tribes moulded together to fight a holy war against a secular occupying state. In the wider political arena Afghanistan became part of the Cold War struggle between East and West and more particularly between the United States and the Soviet Union.⁷

A maturation of the resistance movement from local organisation to national planning and implementation in the mid-1980's coincided with significant financial assistance from the US, Pakistan, Iran and Saudi Arabia to the *mujahedeen* cause and led to the withdrawal of the Soviets from Afghanistan in February 1989.⁸

At this critical stage, the country's diverse, tribal population had an opportunity for the first time in a generation to create a lasting peace. Instead the country quickly spiralled into a civil war fought along old ethnic, linguistic and religious grounds and financed by foreign sponsors. The primary intent of some of the armed groups was ethnic nationalism and joining forces with their ethnic cousins in newly formed neighbouring independent republics, rather than creating a unified Afghanistan. As a result, the former *mujahedeen* alliance quickly fragmented, fracturing along ethnic and tribal lines. Different factions led by warlords with networks of support built on language, ethnicity, kinship and political ideology scrabbled for power and internecine fighting broke out, reducing Afghanistan to a fractured collection of territories.

Out of this chaos the Taliban emerged as a serious political force in the mid-1990's, seizing power in 1998. Their meteoric rise to power owed much to their appeal as a uniting force with a divinely directed mandate to rid the country of corruption and warlord power. Taliban Afghanistan became a theocratic state under which Islam was the state religion, dictating the government of the country.

⁷ Wardak, note 2, p.321-323

⁸ Misdaq, N. *Afghanistan. Political Frailty and Foreign Interference*, Routledge (2006); p.168

In the international arena Taliban Afghanistan was largely isolated. Only Saudi Arabia, Pakistan and the United Arab Emirates officially recognised the Taliban as Afghanistan's legitimate government. It faced criticism for its undiluted Islamic radicalism that breached international standards of human rights. The United Nations refused to accept the legitimacy of the Taliban regime due to its failure to hold democratic elections and it was ostracised on the world stage as a result of its defiance of two United Nations Security Council resolutions in 1999 and 2000 relating to its association with Al Qaida.⁹

Following the tragic events in New York and Washington in September 2001, Afghanistan became a fundamental strategic priority for the US and it intensified pressure on the Taliban to locate and hand over Osama Bin Laden. When these overtures were rejected the US commenced a military campaign on 7 October 2001, given the title of 'Operation Enduring Freedom', which resulted in the removal of the Taliban from power in early December.¹⁰

The Afghan government later observed that 'after nearly three decades of continuous conflict the country emerged [in 2001] ... as a truly devastated state with its human, physical and institutional infrastructure destroyed or severely damaged.'¹¹ It is estimated that between 1978 and 2001 1 million of Afghanistan's population were killed, 2 million left disabled and 7 million displaced.¹² Serious human rights abuses were perpetrated during this period, including massacres, revenge killings, torture, murder and assassinations.¹³

The economy collapsed in the period following the Soviet invasion in 1979 and a new war economy emerged centred on the production and trafficking of illicit drugs, perpetrated firstly by the *mujahedeen* to finance arms requirements in the war against

⁹ S/RES/1267 (15.10.1999) which established a sanctions regime to cover individuals and entities associated with Al Qaida and S/RES1333 (19.12.2000) which established a ban on arms and flight restrictions. The link between Taliban Afghanistan and Al Qaida resulted in the country being regarded as a 'rogue state,' capable of threatening international peace and security. See Kuovo, S. *State-building and rule of law: lessons from Afghanistan?* NDC Forum Paper Series (Rome: NATO Defence College, 2009); available at <http://www.ndc.nato.int>, p.9

¹⁰ The military campaign was initially named *Operation Infinite Justice*, but this was replaced with *Operation Enduring Freedom* on the grounds that *Operation Infinite Justice* might imply that the US military as opposed to only God could dispense final justice and its potential insinuation of vengeance and global gendarmerie. See Woodward, B. *Bush at War*, Simon & Schuster, New York (2004), p.209

¹¹ Afghanistan National Development Strategy (ANDS) 2008 available at www.undp.org.af/publications/KeyDocuments/ANDS_Full_Eng.pdf, p.3

¹² Nadery, A. 'Peace or Justice? Transitional Justice in Afghanistan' (2007) Vol. 1, *International Journal of Transitional Justice*, 173-179, p 174

¹³ Wardak, note 2, p.329

the Soviets and later, following the Soviet withdrawal, by local warlords to finance their struggle for power during the civil war.¹⁴ The growth in the opium economy was augmented by a breakdown in the power of the central state during the Soviet war in the 1980's and the civil war in the 1990's weakening legal constraints on opium cultivation, production and trafficking.¹⁵ As a result, opium production increased dramatically. Whereas in 1980, Afghanistan had produced 19% of world opium, by 1999 it was producing 79% of global output and it remained the world's leading producer of opium in 2002 following the removal of the Taliban from power.¹⁶

Health services, education facilities and employment opportunities were also badly affected during the Soviet occupation and civil war and continue to be poor. It is estimated that 72% of the adult population in Afghanistan is illiterate, representing one of world's lowest literacy rates.¹⁷ In 2007 Afghanistan was ranked 174th out of 178 countries for human development.¹⁸ Approximately 80% of the population continue to live in rural areas, mostly at subsistence level,¹⁹ and average earnings are estimated to be less than \$2 a day.²⁰

Against this background the international community has been engaged in an extensive programme of reform which commenced in November 2001 with the adoption by the United Nations Security Council of Resolution 1378²¹ that called on Member States to assist with the reconstruction of Afghanistan and provide support for the implementation of an interim 'broad-based, multi-ethnic' administration.²² In

¹⁴ UNODC, *The Opium Economy in Afghanistan. An International Problem* (2003) available at <http://www.reliefweb.int/library/documents/2003/unodc-afg-31jan.pdf>, p. 90. Before the Soviet war 85% of the population lived in rural areas and agriculture accounted for 68% of employment in the country. However, between 1979 and 1989, approximately two thirds of the country's villages were bombed and one third of all farms were abandoned. More than 30% of the population fled the country and the depopulation of rural areas resulted in severe disruption to agricultural trade and food production, which declined by as much as 45%

¹⁵ *ibid*, p. 89

¹⁶ *ibid*

¹⁷ US Central Intelligence Agency World Factbook available at www.cia.gov/library/publication/the-world-factbook/geos/af.html. Adult literacy is 28.1% of the population.

¹⁸ UNDP, *Afghanistan Human Development Report, Security With a Human Face: Challenges and Responsibilities* (2004) available at

<http://planipolis.iiep.unesco.org/upload/Afghanistan/Afghanistan%20HDR%20202004.pdf>, p.18-19.

Average life expectancy was only 43 years and 26% children were dying before reaching age of 5

¹⁹ Thier, J. A. *The Future of Afghanistan*, United States Institute of Peace, Washington DC (2009), p.39

²⁰ Integrity Watch Afghanistan, *Afghan Perceptions and Experiences of Corruption. A National Survey* (2010) available at www.iwaweb.org, p 4. In 2008 it was estimated that 6.5 million Afghans were dependent on food aid, 42% of the population were living below the poverty line and 40% were unemployed. See ANDS 2008, note 11, p.187

²¹ S/RES1378, U.N. SCOR, 56th Session, U.N. Doc. S/RES/1378 (2001). In addition to expressing a need to support the Afghan people in their establishment of a new administration it urged member states to provide humanitarian assistance and funding for reconstructions and rehabilitation projects.

²² *ibid*

response to this mandate convened the Bonn Conference, attended by a number of representative Afghan groups,²³ which led to the Bonn Agreement.²⁴

Under the Agreement the 1964 Constitution was adopted until a new Constitution was prepared. It represented a compromise between Islamic tradition and modern reform and conveniently provided a structure for the organisation of the Courts and for acceptable human rights protections. According to Chesterman, the reliance on the 1964 Constitution post-Bonn was 'an attempt to connect the peace process with memories of a more stable Afghanistan' during the 1960's and 1970's under Mohammad Zahir.²⁵ Unlike many of its predecessors it had been drafted following a process of consultation and participation from a large cross section of Afghan society represented in the *Loya Jirga* 1964 constitutional assembly. Until the country slipped into turmoil, chaos and occupation following Mohammad Daoud's coup in 1973, it advanced the concept of popular political participation and ushered in a period of relative peace and national stability.²⁶

It was regarded as the one Afghan Constitution of recent history which had successfully affected a compromise between traditionalists favouring Islamic jurisprudence and modernist reformers seeking enactment of and adherence to new statutory legislation. According to Arjomand it 'was the product of the meeting of liberal constitutionalism and Islamic modernism that proposed to interpret the principles of Islam without undue restriction from the rigidities of medieval Islamic jurisprudence and succeeded in finding the finest formula for the reconciliation of Islam and constitutionalism in the Middle East to that date or since.'²⁷

²³ The period from the defeat of the Taliban to the installation of a new administration took only 76 days. See Johnson, T.H. 'Afghanistan's post-Taliban transition: the state of state-building after war,' (March-June 2006), 25(1-2), *Central Asian Survey*, 1-26, ; p.3 and 4. According to Johnson the key factions were the Peshawar group (mostly Pashtun), the Cyprus groups (Iranian backed), the Rome group (on behalf of the former King, Mohammed Zahir Shah) and the Northern Alliance (primarily Tajik); p.23.

²⁴ The Agreement was given official UN endorsement in Security Council Resolution 1383 on 6 December 2001. The resolution noted the desire of the Afghan people to 'end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights.' Security Council Resolution 1383, U.N. SCOR 56th Session, U.N. Doc. S/RES/1383 (2001). The official title of the agreement was the 'Agreement on the Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions' 5 December 2001 S/2001/1154

²⁵ Chesterman, S. 'Justice Under International Administration: Kosovo, East Timor and Afghanistan', (September 2002) *International Peace Academy Report*, p.1-14, p.9

²⁶ Lau, M. (2002) 'Afghanistan's Legal System and its Compatibility with International Human Rights Standards,' International Commission of Jurists. Lau refer to the period 1964 to 1973 as 'the Constitutional Period' p.29. See also Arjomand, S.A. 'Constitutional Developments in Afghanistan: A Comparative and Historical Perspective' (2005) *Drake Law Review*, vol 53, 4, p943-962. Arjomand notes that the Constitution of 1964 brought about 'a decade of democratic politics with a flourishing free press, student demonstrations and political mobilization' p.953

²⁷ Arjomand, note 26, p.952

This formula included the stipulation that the legislature must observe that statutory law is the primary source of law but that statutory law must nevertheless adhere to Islamic principles.²⁸ This harmonisation of Islamic and statutory jurisprudence in a manner that could preserve Islamic tenets while reacting to social and democratic development was regarded as an appropriate platform upon which to start the process of legal reform, and indeed criminal justice reform, in post-Taliban Afghanistan.²⁹

The 1964 Constitution had created legal institutions, established a court structure and ensured critical human rights protections. It had insisted on fundamental human rights safeguards including equality before the law (article 25), the right to a fair trial, to liberty and human dignity (article 26) and the right to instruct defence counsel (article 26). It had also created for the first time an independent judiciary (article 97) to protect judges from political pressures and that was placed under the supervision of a newly established Supreme Court (article 105). In addition it has established the office of the Attorney General, which was tasked with the duty of investigating crime (article 103) and placed under the authority of the Ministry of Justice. These protections and institutions would now apply post-2001 for the purposes of the criminal justice system in Afghanistan in accordance with the provisions of the Bonn Agreement. The same was the case with regard to the organisation of the court system laid down in the 1964 Constitution, and the later 1967 'Law of the Jurisdiction and Organisation of the Courts of Afghanistan.' This was a bi-partite national court system, divided into general courts comprising the Supreme Court, the Court of Cassation, the High Court of Appeal, Provincial courts and Primary (district) courts, and specialised courts consisting of juvenile courts, labour courts and other dedicated courts established by the Supreme Court as and when required. The Supreme Court, established on 15 October 1967 became the highest Court in the country, its authority extended to organising and administering the lower courts and the judiciary. Within it, the Court of Cassation was placed in charge of reviewing the decisions of the provincial courts on issues of law and their conformity with Hanafi *Shari'a* jurisprudence. Below these courts was the High Court of Appeal, based in Kabul, to which appeals against the decisions of the Provincial Courts were referred. Each province in Afghanistan was assigned one Provincial Court which would have limited jurisdiction related to specific criminal offences, including drug smuggling, and the consideration of appeals of decisions made by lower Primary Courts. The Chief Justice would be responsible for deciding on

²⁸ article 64

²⁹ Kamali, M.H. 'Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary', Leiden 1985, p.21

the number of Primary Courts that should be allocated for each province. All criminal cases would be started in the Primary courts but the decisions reached would only be considered final if the sentence pronounced did not exceed imprisonment for a period of more than one month. In addition, decisions in the Primary court had binding authority if they were not appealed other than those involving *quisas* offences, or sentences of capital punishment and life imprisonment. This court structure and the criminal justice court system largely remained intact following the upheavals of the previous three decades. It was adopted by the interim administration as the applicable legal system in accordance with the Bonn Agreement and indeed, it remained in operation until the adoption of the 2004 Constitution.³⁰

³⁰ Weinbaum M.G. (1980) 'Legal Elites in Afghan Society' International Journal of Middle East Studies 12 39-57; p.52. See also Arjomand, note 26, p.952. and Lau, note 26, p.14-18

Appendix 2: Customary justice – *nanawati*, warlord interference and *baad* practices

Seeking pardon (*nanawati*)

A typical form of *nanawati* requires the guilty party to slaughter a sheep outside the victim's house accompanied by a delegation including an elder, a female relative and a mullah. The group then enter the victim's house and seek forgiveness which the *pashtunwali* code dictates must be granted, whereupon the parties are reconciled.¹ Serious offences demand greater acts of contrition to achieve pardon and may necessitate the presentation of blood-money (*khunbaha*) by way of compensation. The *nanawati* for intentional or accidental murder can require the perpetrator's relatives to help carry the victim's body to a gravesite, while that for the abduction and murder of a married woman 'requires the giving of four copies of the Holy Koran, four women, and a fat sheep to the victim's family,'²

Warlord interference

The extent to which local strongmen and warlords actually intervene in customary justice mechanisms remains a matter for speculation. A report by the Feinstein International Famine Centre in 2004 concluded that 'armed political groups, commanders and warlords have strategically targeted traditional customary justice systems (*jirgas* and *shuras*) throughout rural Afghanistan in their attempt to control local populations. In many instances, these predatory forces have successfully positioned their loyalists within these groups, thus undermining this avenue of justice for rural Afghans.'³ However, in a 2007 survey by the UNDP only 12% of respondents confirmed that local commanders were always represented at *jirgas* or *shuras*,⁴ which suggests that the vast majority of customary criminal proceedings are immune from undue influence by warlords.

¹ Wardak, A. *Jirga – A Traditional Mechanism of Conflict Resolution in Afghanistan* available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN017434.pdf>, p.32

² International Legal Foundation, *The Customary Laws of Afghanistan*, New York/Kabul: ILF, (Sept. 2004) available at <http://www.theilf.org/Customary%20Laws.pdf>, p.10

³ Feinstein International Famine Centre, *Human Security and Livelihoods of Rural Afghans, 2002-2003* (2004) available at <http://famine.tufts.edu/pdf/Mazurana2.pdf>; p.1-264, p.7

⁴ UNDP, Afghanistan Human Development Report *Building Modernity and Tradition: Rule of Law and the Search for Justice* (2007) available at <http://hdr.undp.org/en/reports/national/asiathepacific/afghanistan/nhdr2007.pdf> p.98

The frequency of *baad* practices

Baad practices violate Islamic *Shari'a*⁵ and are criminalized by state law⁶ but remain relevant for customary approaches to criminal justice. There is, however, some debate as to the level of frequency with which decisions of this nature are reached. The UNDP reported in 2007 that decisions involving *baad* were 'quite rare'⁷ and an exception rather than the norm.⁸ This may be the result of victim's reluctance to issue complaints for fear of reprisal or rejection by their community rather than evidence that *baad* practice is in decline. Victims are unlikely to be aware of their legal rights to challenge it. According to the 2009 article 'many women cannot read or write, and they have no information about the legal code or *Shari'a* law. The misery of *baad* will continue until women are made aware of their rights.'⁹

The custom of *baad* has been practiced in Afghanistan since reconstruction work on the state justice system began in 2001 and continues to be considered a relevant form of justice in the country. A report in 2003 commissioned by the Women and Children Legal Research Foundation concluded that the practice of *baad* was 'a critical problem in all parts of the country.'¹⁰ A more recent 2008 report by the same body found that traditional practices fundamentally limit women's access to justice and that women 'are more likely to face discrimination and violation of their rights'¹¹ if legal matters, including criminal issues, are resolved by *jirgas*. In the light of this, the report recommended that '*jirgas* should be prevented from dealing with women's cases.'¹²

⁵ Women and Children Legal Research Foundation, *Bad Painful Sedative* (2003), available at http://www.wclrf.org.af/English/eng_pages/Researches/Badpainful/badpainful.htm Chapter 3. Verse 19 of the Nisa Chapter states 'the pious Moslem, you are not permitted to receive women by force as a heritage. Do not treat them harshly and make life pleasant for them.'

⁶ it is criminalized by the Penal Code 1976, article 17, para. 2 and it is also in contravention of Chapter A, article 6 of the Islamic Declaration of Human Rights, Article 2 of the Universal Declaration of Human Rights and Article 6 of the International Convention on the Elimination of all forms of Discrimination Against Women all of which Afghanistan is a party to. An Afghan state law, the Elimination of Violence Against Women was introduced in July 2010, which formally criminalises *baad* practices as well as polygamy and under age marriage. See UK Foreign and Commonwealth Office, '*The Shia Family Law*,' available at <http://www.fco.gov.uk/en/global-issues/conflict-prevention/afghanistan21/human-rights/shia-FAMILY-LAW>

⁷ UNDP, note 4, p.97

⁸ *ibid*, p.94

⁹ Paykan, W. *Afghan Girls Suffer For Sins of Male Relatives*, Institute for War and Peace Reporting, arr.no. 317 (26.03.2009), available at http://www.iwpr.net?p=351344&apc_state=heniarr200903

¹⁰ WCLRF report, note 5

¹¹ WCLRF, *Women's Access to Justice* (2008) available at http://www.wclrf.org.af/English/eng_pages/Researches/Women_a_t_Justice/WATJ.pdf, p.25

¹² *ibid*, p.42

Appendix 3: The Tokyo Conference 2002, Lead Nation Designation and Constitutional Reform

At the Tokyo Conference in January 2002¹ a number of countries made significant financial pledges towards reconstruction efforts² and were awarded 'lead nation' responsibility for the reform of various state sectors. In contrast to its high-profile participation in other post-conflict nations³ the UN, whose partnership with Afghanistan was formally ratified by the establishment of the United Nations Assistance Mission in Afghanistan (UNAMA) in March 2002,⁴ chose to adopt a minimalist, 'light footprint'⁵ approach to Afghanistan reconstruction. The expansive mandates that it had assumed in East Timor and Kosovo⁶ that had provided it with single-handed responsibility for justice reform were replaced in Afghanistan with an assistance role designed instead to support, foster and augment Afghan reform efforts.⁷ It would, it was hoped, encourage increased Afghan ownership.⁸ At the same time, it was anticipated that it would deter donor nations from relying upon and then under-funding the UN as had been its experience in previous post-conflict reconstruction operations and instead compel them to assume more proactive assistance roles.⁹

¹ The 'International Conference on Reconstruction Assistance to Afghanistan' took place in Tokyo on 21 and 22 January 2002, held at ministerial level and co-chaired by Japan, US, EU and Saudi Arabia. See Consulate General of Japan in New York, Japan Info: Tokyo Hosts International Conference on Reconstruction Assistance to Afghanistan, available at www.cgj.org/en/c/vol_09-5/title_02.htm

² According to the Japanese Ministry of Foreign Affairs the total cumulative financial commitment amounted to \$4.5 billion, with \$1.8 billion pledged for 2002; see 'Co-Chairs Summary of Conclusion. The International Conference on Reconstruction Assistance to Afghanistan, January 21-22, 2002' available at http://www.mofa.go.jp/region/middle_e/afghanistan/min0201/summary.pdf

³ notably Kosovo and East Timor

⁴ UN Security Resolution 1401 2002. See Thier, J.A. 'Re-establishing the Judicial System in Afghanistan' CDDRL Working Papers, 19, 01.09.2004. Their notes that UNAMA had an advisory capacity only to the Afghan government rather than any implementation responsibility p.13

⁵ it was confirmed as a 'light expatriate footprint' strategy by the Special Representative of the Secretary General, Lakhdar Brahimi, at the Opening of 55th Annual DPI/NGO conference 'Rebuilding Societies Emerging from Conflict: A Shared Responsibility' 09.09.2002 available at www.unama-afg.org/news/statement/SRSG/2002/02sep09.htm

⁶ In Kosovo, the United Nations Mission in Kosovo (UNMIK) established the Kosovo War and Ethnic Crimes Court, an international court staffed predominately by international judges. Similarly, the justice system established in East Timor was run by the United Nations Transitional Administration in East Timor (UNTAET), staffed by foreigners. See Dickinson, L.A. 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals,' (2002) 31 (3), *Denver Journal of International Law & Policy*, pp.23-37

⁷ In fact, this minimalist policy has been replicated elsewhere since 2001 and the UN has adopted advisory and assistance as opposed to lead roles in justice and rule of law areas in the Democratic Republic of Congo (see U.N. SCOR, 58th Sess., 4797th mtg., U.N. Doc. S/RES/1493 at 11, (2003)); Liberia (see U.N. SCOR, 58th Sess., 4830th mtg., U.N. Doc. S/RES/1509 at 13, (2003)); Haiti (see U.N. SCOR, 59th Sess., 4961st mtg., U.N. Doc. S/RES/1542 at 7(1)(d), (2004)); and Burundi (see U.N. SCOR, 59th Sess., 4976th mtg., U.N. Doc. S/RES/1542 at 6, (2004)); see O'Connor, V 'Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States: Model Codes for Post Conflict Criminal Justice As a Tool of Assistance,' (2005) 16, *Criminal Law Forum*, .231-255, p.234

⁸ It was thought to be in tune with the message of the Bonn Agreement, that underlined the 'right of the people of Afghanistan to freely determine their own political future.' See UN Security Council, 'Agreement on the Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions' 5 December 2001 S/2001/1154; preamble to the Agreement p.2; available at <http://www.afghan-web.com>

⁹ see USIP, *Establishing the Rule of Law in Afghanistan*. Special Report 117 (March 2004) available at

In May 2002, a few months after the Tokyo conference¹⁰, the AIA established a Judicial Commission which was tasked with implementing a law reform programme incorporating the compilation, publishing and distribution of all laws and to recommend new legislation to assist the AIA in the administration of justice. It was also charged with legal training and the appointment of judges, prosecutors and law enforcement officials.¹¹ The initial 16-member Commission was dissolved after only four months due to tensions amongst members aligned to the Ministry of Justice and the Supreme Court over control over the Attorney General's Office of the power to appoint judges.¹² A second 10-member commission was installed in November 2002 charged with similar tasks and given responsibility to coordinate the reconstruction of the justice system. This Judicial Reform Commission (JRC) comprised key personnel from the central institutions of the justice sector including a former Minister of Justice, two former Attorney's General and three former Supreme Court justices in an effort to draw on a broad range of experience and skills and to foster a constructive working relationship between formerly competitive elements among the main justice sector institutions.¹³

In December 2002 Italy convened a conference in Rome where international donors pledged a further US\$30 million funds for the justice sector.¹⁴ In response to its new lead nation role it also established the 'Italian Justice Project Office' (IJPO) which was designed to provide assistance to the JRC and local justice institutions.¹⁵ Gaining impetus from deliberations at the Rome conference, the JRC developed a Master Plan in which it identified 30 separate projects in areas including law reform, training and legal education to be conducted over an 18-month period.¹⁶ However, divisions within the JRC among representatives of the Supreme Court and the Ministry of Justice soon stifled its ability to operate as a coordinating body.¹⁷ The schisms within it weakened its ability to persuade the Constitutional Commission and government bodies to deliberate

<http://www.usip.org/pubs/specialreports/sr117.pdf> , p. 5

¹⁰ The 'International Conference on Reconstruction Assistance to Afghanistan' took place in Tokyo on 21 and 22 January 2002, held at ministerial level and co-chaired by Japan, US, EU and Saudi Arabia. See Consulate General of Japan in New York, Japan Info: Tokyo Hosts International Conference on Reconstruction Assistance to Afghanistan, available at www.cgi.org/en/c/vol_09-5/title_02.htm

¹¹ see Bosi, T.D. Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan (2003) 19(3), *New York Law School Journal*, 819-831, p.824

¹² Their, J.A. 'Re-establishing the Judicial System in Afghanistan' Centre on Democracy, Development and the Rule of Law, Stanford Institute for International Studies, Working Paper; no.19, 1 September 2004, p.8 available at <http://www.cddril.stanford.edu>. Their suggest that the Judicial Commission was dissolved due to 'political tension among members, the lack of a clear agenda and the impression of undue conservatism among some in the Afghan Transitional Authority'.

¹³ *ibid*

¹⁴ Press briefing, spokesman for the Special Representative of the Secretary-General on Afghanistan, 26 January 2003

¹⁵ Tondini, M., (2010) 'Statebuilding and Justice Reform: Post-Conflict Reconstruction in Afghanistan,' Routledge; p.48

¹⁶ Their, note 12, p.12

¹⁷ *Ibid*, p.19

and act on reforms necessary for the reform of the justice system.¹⁸ Its failure to affect institutional changes led to its later dissolution in 2005,¹⁹ by which time it had, according to the 2007 Human Development Report 'achieved only a limited level of success' in relation to implementing justice reform.²⁰

In January 2003, under Italian leadership, a Justice Sector Consultative Group (JSCG) was established and led by the Ministry of Justice. Italy was the lead donor participant, amongst donors including the US, Germany, Canada and the UK. The UN maintained a presence principally through UNAMA.²¹ The JSCG was designed to be a national level mechanism for the donor countries, Afghan government and international organisations to coordinate their policies and activities and agree on means of implementation. However, while it facilitated information-sharing, it was reported to have failed at establishing sufficient consultation and communication between the various justice agencies and donors, resulting in an uncoordinated and *ad hoc* implementation of justice reform from the time of its establishment to mid-2005, which may have influenced the application of the ICPC.²²

Constitutional Reform

Ratified on 4 January 2004 the new Constitution proclaimed that the intention of the Afghan State was to create 'a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and ensur[e] the fundamental rights and freedoms of the people.'²³ It has been acknowledged as Afghanistan's 'legislative keystone'²⁴ as it asserts that all new

¹⁸ Rubin et al, (2005) 'Afghanistan 2005 and Beyond. Prospects for Improved Stability Reference Document,' Netherlands Institute of International Relations 'Clingendael' Conflict Research Unit April 2005; p.42

¹⁹ Decree on Dissolution of the Judicial Commission, Official Gazette No.862 22.09.2005, available at USAID-ARoLP database.

²⁰ UNDP, Afghanistan Human Development Report *Building Modernity and Tradition: Rule of Law and the Search for Justice* (2007) available at <http://hdr.undp.org/en/reports/national/asiathepacific/afghanistan/nhdr2007.pdf>, p. 81

²¹ UNAMA, *Justice Sector Overview* (April 2007), p.2

²² Ibid, p.2. See also UNDP, note 20, p. 81

²³ See Preamble of The Afghan Constitution 2004, para 8; available at http://www.servat.unibe.ch/law/icl/af00000_.html. The vision and content of this Constitution won it considerable praise amongst elite UN officials, academics and politicians at the time of its introduction, and it was variously described it as an 'historic achievement,' a 'blueprint for Afghanistan's emerging democracy' and a 'model for the Islamic world;' See U.N Secretary General Kofi Annan 'Afghan Charter Wins World Praise, BBC News available at http://www.news.bbc.co.uk/1/hi/world/south_asia; United Nations Development Programme Report 'Afghanistan. A Country on the Move' March 2005 p.3 and Feldman, N. 'A New Democracy, Enshrined in Faith' *New York Times* 13.11. 2003

²⁴ UNODC (2008) 'Thematic Evaluation of the Technical Assistance Provided To Afghanistan By The United Nations Office On Drugs And Crime,' Vol 4, Rule of Law Programme, p.1-62, p.3

statutes, law and regulations must comply with its provisions.²⁵ To that extent it remains a significant source of criminal law and procedure in Afghanistan.²⁶

It provides for a presidential system with a centralised administration avoiding distribution of power between a president and a prime minister which had invoked power struggles in the past.²⁷ It also retains a bicameral parliament with an elected lower house and an upper house, one-third of whose members are appointed by the President, while the remaining two-thirds are elected.²⁸ Apart from the removal of the central Court of Appeal in Kabul and absorption of the Court of Cassation into the Supreme Court,²⁹ the structure of the court system – later supplemented by the provisions of the 2005 Law of the Organisation and Authority of the Courts – is little changed from that previously prescribed by the Law on the Jurisdiction and Organisation of the Courts in Afghanistan in 1968. As a result, the judicial system comprises the judiciary, represented by the Supreme Court, Courts of Appeal and Primary Courts,³⁰ the Attorney-General and Ministry of Justice.

The Supreme Court is established as the central authority of the Afghan judiciary responsible for administering and overseeing the judicial system, appointing judges and ensuring the compatibility of new legislation with constitutional provisions. Its nine members, led by the Chief Justice, are appointed by the President for ten-year posts following referral by the Lower House (*Wolesi Jirga*)³¹ and in conjunction with their meeting stipulated age and educational requirements.³²

Provincial Appeal Courts are the second most authoritative judicial bodies whose mandate is to review the judicial decisions of the Primary Courts. There is one for each province, each having a designated section dealing with criminal offences. These

²⁵ Gholami, H. 'Basics of Afghan Law and Criminal Justice' (2007) available at <http://www.auswaertigesamt.de/diplo/de/Aussenpolitik/RegionaleSchwerpunkte/AfghanistanZentralasien/Downloads/Polizei-Legal-Manual.pdf>, p.75

²⁶ Ibid, p.154. The process which led to its enactment started not long after the assignment of donor nation reconstruction roles at the Tokyo Conference. In accordance with the Bonn Agreement (article 1(6)) President Karzai appointed a nine-member Constitutional Committee in October 2002 which prepared a draft Constitution. This was placed before 502 delegates representing the country's assorted ethnic and tribal factions for consideration at a Constitutional Loya Jirga in December 2003 and approved following three weeks of negotiations, resulting in the promulgation of the final draft at the beginning of 2004.

²⁷ Arjomand, S.A. 'Constitutional Developments in Afghanistan: A Comparative and Historical Perspective,' (2004-2005) 53 (4) *Drake Law Review*, p.943-962; p.956

²⁸ article 84

²⁹ articles 116-136

³⁰ article 116 and see also the Law of the Organisation and Authority of the Courts 2005

³¹ article 117 Law of the Organisation and Authority of the Courts 2005

³² article 118 members must be at least 40 years old and have higher education qualifications in either formal state law or Islamic jurisprudence

courts have jurisdiction over 'public' crimes, crimes against public security and traffic related criminal cases and involve jury-less trials presided over by three judges.³³

A number of the Constitution's provisions establish cornerstone principles and guidelines that are significant in the context of criminal justice. Articles 6 and 7 demand respect for international human rights and confirm that the Afghan state will observe the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights³⁴ and the international conventions and treaties to which it has agreed to adhere. These include the ICCPR,³⁵ the Cairo Declaration on Human Rights in Islam 1990,³⁶ the Convention on the Elimination of All Forms of Discrimination Against Women 1980,³⁷ and the Rome Statute of the International Criminal Court 1998³⁸ all of which consequentially are relevant in the context of Afghan criminal law and procedure.

With regard to the Constitution's links to the ICPC and the CNL, it stipulates in general terms the requirement for a system of criminal procedure and criminal justice that provides due process rights to defendants and which constrains representatives of the state, including the police and prosecutors, in the exercise of their duties in an effort to ensure against intimidation and coercion of defendants.³⁹ In this manner it provides rights to individuals which cannot be marginalized or indeed infringed by other criminal legislation, but which should in fact be complimented by the provisions of new criminal law. These include internationally recognised principles of fair trial standards such as equality before the law,⁴⁰ the right to legal representation,⁴¹ the right to silence,⁴² the

³³ Article 6 of the Law of the Organisation and Authority of the Courts of the Islamic Republic of Afghanistan 2005. It was the intention of the 2005 Law that there should be a Primary Court, where three judges preside over cases in each of Afghanistan's 364 separate districts and furthermore that Urban Primary Courts should be established in each provincial centre which would handle criminal cases at first instance; see Article 47(1) Law of the Organisation and Authority of the Courts of the Islamic Republic of Afghanistan, 2005

³⁴ Universal Declaration of Human Rights, UN General Assembly Resolution 217A(III), 10 December 1948

³⁵ The International Covenant on Civil and Political Rights, 1966 was acceded to on 24 January 1983. It guarantees fundamental rights such as the right to life, liberty and human dignity (articles 6, 9 and 10), freedom from torture (article 7), due process rights (article 14) and the principle of innocence until proven guilty (article 15).

³⁶ The Cairo Declaration on Human Rights in Islam provides for the right to life and security of the person (articles 2 and 18), the presumption of innocence (article 19), and freedom from arbitrary arrest and torture (article 20)

³⁷ The Elimination of All Forms of Discrimination Against Women, 1980 was acceded to on 5 March 2003. It requires Afghanistan to 'pursue by all appropriate means and without delay a policy of eliminating discrimination against women' and calls for necessary criminal sanctions to uphold this ideal (article 2). More specifically it includes provisions requiring Afghanistan to eliminate the trafficking of women (article 6) and to ensure the equality of men and women before the law (article 15).

³⁸ The Rome Statute of the International Criminal Court, 1998 was acceded to on 10 February 2003. It establishes the International Criminal Court and defines criminal offences that fall within the jurisdiction of the Court.

³⁹ Articles 22-31

⁴⁰ Article 22 Afghan Constitution 2004

⁴¹ article 31 Afghan Constitution 2004

right to be tried without undue delay,⁴³ the presumption of innocence⁴⁴ and freedom from torture.⁴⁵

The Constitution also affirms that Islam is the religion of the state⁴⁶ and is a source of law to the extent that it prohibits the enactment of legal provisions that 'contravene the tenets and provisions of the Holy religion of Islam.'⁴⁷ In addition, it authorises the state to promote religious instruction⁴⁸ and directs that the educational system must be founded on the tenets of the Islamic faith,⁴⁹ a constitutional anomaly given that no previous Constitution has sought to impose constitutional management of religious instruction. The Constitution also provides that while statutory norms take precedence, judges have the right to apply Islamic jurisprudence in cases where no constitutional or statutory provision prevails to deal with the matter in question.⁵⁰ The hierarchy of domestic law is therefore such that the Courts are required to firstly apply the provisions of the Constitution and applicable statutory laws and where no provisions exist in either for the case in question they should follow *Shari'a*, adopting *Hanafi* jurisprudence. As a consequence, if an act is not defined as a crime in law but is regarded as a crime in *Shari'a*, *Hanafi* jurisprudence should be applied. However, if an act is defined as a crime in both *Shari'a* and state law, the provisions of the law must be implemented. Nevertheless, in this regard, the Penal Code, still in force, relates only to *tazir* offences, leaving *huduud*, *quisas* and *diyat* offences to be punished in accordance with *Hanafi* jurisprudence.

The provisions of the Constitution seek to underline and confirm the centrality of the principles and values of the Islamic faith to the Afghan experience. They exist alongside protections for international standards of human rights. In this manner, it seeks to reach a workable and realistic compromise between Islam and western human rights norms. For some observers it successfully achieves the right balance. Noah Feldman regards it as both 'pervasively Islamic' and 'thoroughly democratic' to

⁴² article 30

⁴³ article 31

⁴⁴ article 25

⁴⁵ article 29

⁴⁶ article 2

⁴⁷ article 3

⁴⁸ article 17

⁴⁹ article 45

⁵⁰ article 130. This right, however, does not extend to police or prosecutors, whose roles are defined as the 'discovery of crimes' and 'investigation and prosecution conducted by the Attorney's Office in accordance with the provisions of the law' art 134(1). The 1991 AGO Law is unaffected and remains the legislative authority for the powers and organisation of the AGO under the auspices of the Ministry of Justice. The Saranwali Law 1991 governed the powers of prosecutors and the powers and authority of the police would later be set out in the 2005 Police Law. Official Gazette 862

the extent that it can be regarded as a model for Islamic democracy.⁵¹ Yet the Constitution's attempt to reconcile Islamic norms and human rights standards has at times created uncertainty over the primacy of constitutional and Islamic law.⁵²

The Supreme Court is given responsibility for reviewing legislation and its compliance with Islamic provisions under article 3.⁵³ This enables more fundamentalist personnel in the Supreme Court – itself an un-elected body - unchecked authority to strike out any new legislation which they determine are contrary to the provisions of Islamic law, irrespective of the its compliance with other constitutional and human rights values⁵⁴ or indeed to delay reform processes which they deem to be 'un-Islamic'.⁵⁵ Similarly, while the residual judicial validity of Islamic jurisprudence compliments the still applicable Penal Code⁵⁶ and represents an attempt to strike a workable balance between Islamic and statutory legal influence, the recognition of the validity of potential Islamic punishments under article 130, including *hudud* offences resulting in capital punishment, contradicts other constitutional and indeed international commitments to human rights obligations.⁵⁷ Ambiguities of this nature have created confusion amongst the judiciary and legal actors in relation to the application of criminal law that has on occasion resulted in well-publicised and internationally damaging judicial decision-making based on Islamic interpretations of criminal justice.⁵⁸

⁵¹ See Feldman, note, 23; Feldman describes the 2004 Constitution 'pervasively Islamic' and 'thoroughly democratic.' See also Suhrke who suggests that the intent in 2004 was to create a liberal, constitutional democracy supported by an effective justice system which would foster rule of law, social justice and international standards of human rights; Suhrke, A. 'Reconstruction as Modernisation: the 'post-conflict' project in Afghanistan', (2007), 28:7, *Third World Quarterly*, 1291-1308, p.1298

⁵² The Constitutions of many other Islamic states such as Pakistan (article 25), Lebanon (article 7) and Morocco (article 5) uphold the principles of basic human rights but at the same time confirm that that Islamic faith is the foundation of law suggesting that in Afghanistan Shari'a law should have primacy over constitutional law. See UNODC (2008) 'Thematic Evaluation of the Technical Assistance Provided to Afghanistan by the United Nations Office on Drugs and Crime,' Vol. 4, Rule of Law Programme, May 2008, p. 4

⁵³ article 121

⁵⁴ Arjomand note 27, p.959

⁵⁵ See Deladda, A. *Afghanistan: The Justice System From A people's Perspective* (Sept 2008) available at www.argoriente.it. Deladda notes that the former Chief Justice of the Supreme Court, Fazal Hadi Shinwari delayed justice reform 'by refusing to cooperate with any foreign support that, in his view, risked to 'secularise' the judiciary,' p.7

⁵⁶ article 1

⁵⁷ For example those set out in article 7 ICCPR

⁵⁸ Abdul Rahman was arrested in February 2006 following allegations that he had assaulted his daughters. His wife's family alleged that he had converted to Christianity, whereupon he was charged with apostasy. This was not a criminalized activity under the 1976 Penal Code so Rahman was charged under section 130 of the 2004 Constitution in accordance with Hanafi jurisprudence. Rahman faced the prospect of being sentenced to death in spite of the fact that article 7 of the Constitution obliges Afghanistan to observe article 18 of the Universal Declaration of Human Rights 1948 an article 18 of the International Covenant on Civil and Political Rights 1966 which both allow for freedom of religious choice. The case attracted worldwide publicity and Rahman was released and the case suspended on a technicality, whereupon he was transported to Italy where he requested political asylum. See UNAMA report p.37. The International Crisis Group has called for a review of the 2004 Constitution by 2014 to reduce the power of the President to influence the Supreme Court. According to a report in November 2010 'the strong presidential system adopted under the 2004 Constitution has only exacerbated the weakness of judicial institutions. The lack

of a clearly defined arbiter of the constitution has undercut the authority of the Supreme Court and transformed the court into a puppet of President Hamid Karzai;’ see International Crisis Group, *Reforming Afghanistan’s Broken Judiciary*, Asia Report No. 195 (17.11.2010) available at <http://www.crisisgroup.org/en/regions/asai/south-asia/afghanistan/195-reforming-afghanistans-broken-judiciary.aspx>, p.1-2. By way of example the Constitution entitles the President to pardon criminals who have had their sentences confirmed by the Supreme Court and in 2009 Amnesty International reported that between 800 to 1,000 pardons were granted annually, with numbers increasing before elections. Some of those pardoned were well-connected individuals convicted of serious crimes. One example is Bilal, convicted for trafficking heroin when head of the Border Guards in Takhar Province who was granted a pardon in 2009 and whose uncle, Haji Din Mohammad was appointed Karzai’s election campaign manager soon afterwards. See Carter, S. and Clark, K. *No Shortcut to Stability. Justice, Politics and Insurgency in Afghanistan*, Chatham House, (2010) available at www.chathamhouse.org.uk/publications/papers/view/-/id/985, p.33

Appendix 4: Confessions and the ICPC

Confessions are not included in the list of suggested 'key tools' in article 37(3) of the ICPC but the Code does not prohibit their use as evidence in criminal proceedings. Nevertheless, suspects and accused individuals are protected against any form of coercion to extract a confession in article 5. The protections provided under article 5 are wider than those in the earlier 1965 Code which provided that 'a statement obtained from an accused or any other person by compulsion is invalid' (article 78).

According to a commentary on the ICPC by Di Gennaro the missed inclusion of confession in the list of the law's 'key tools' was deliberate and 'demonstrates that Afghanistan wants to align its criminal procedure system with those of advanced democratic countries. In this context confession is to be made in absolute psychological freedom and the self accusation of the offender takes the value of an important clue to be matched by other evidentiary elements for being corroborated as a full fledged proof.'¹

¹ IDLO *Criminal Law and Procedure in Afghanistan: Focus on Gender Issues* (2007) available at www.idlo.int, p.46-47

Appendix 5: The Italian Code of Criminal Procedure 1988

The Italian Code of Criminal Procedure was enacted on 24 October 1988. It introduced adversarial practices into Italian criminal procedure, which until then had been largely dominated by accusatorial features. Prior to the Code being passed into law, criminal procedure stipulated that a public prosecutor should assemble a dossier of evidence against the accused during the preliminary investigation stage. Trials would be jury-less and conducted before a Judge who controlled the proceedings and considered evidence presented in the form of the dossier to establish the truth.

The 1988 Code limited the influence of the dossier and strengthened the impact of the trial. Different Judges would preside over hearings during the preliminary investigation and preliminary hearings and the trial to improve the impartiality of trial Judges. In addition, trials would be conducted along adversarial principles with the burden of proof falling on the prosecutor who would contest evidence produced at trial rather than that contained only in the dossier. On the other hand, some of the procedures set down in the Code are regarded as being more aligned with those of a civil law tradition. The trial, for example, will determine guilt and length of sentence, so mitigating evidence in relation to sentencing must be presented at trial. In addition, trials are largely juryless, except for those cases involving serious crimes, such as murder and treason.

Appendix 6: Afghanistan's Emerging Opium Economy: 1924-2005

1924-1979

Opium poppy has been cultivated in Afghanistan since at least the 18th century, although little was known of the nature and extent of poppy cultivation or indeed domestic attitudes towards the use and cultivation of narcotic drugs until the Afghan government began to participate with a newly emerging international drug control system in the beginning of the 20th century.¹ As a result of Afghanistan's involvement with the Second Opium Conference convened by the League of Nations in 1924 it was determined that the cultivation and use of opium in the country was officially tolerated² and that its exportation was subject to a 5% government levy.³ It is thought that up until this time opium consumption in the country was low, opium poppy was not considered to be a traditional crop, and it was only produced in a small number of provinces, in particular Badakshan. Indeed, opium cultivation in Afghanistan remained very modest until the late 20th century. In 1932 the area under cultivation was 4,000 hectares and it was producing 75 tons of opium; less than 2% of that produced in China at the time.⁴

Throughout the 1930's opium production did not increase beyond 100 tons per annum, in spite of the fact that it was not an illegal activity. It was not until 1945 that a law was introduced prohibiting its production, although smuggling continued through India.⁵ A further law was passed in 1957 prohibiting the cultivation, commerce, buying, selling, importation, exportation and use of opium but it was non-specific with regards to the penalties for the commission of offences.⁶ By this stage Afghan traffickers were exploiting a gap in the market left by the collapse of the Iranian opium trade caused by a ban on poppy cultivation imposed by the Shah in 1955.⁷ Inadequate enforcement capacity and resources resulted in the government being unable to enforce the ban

¹ UNODCCP, *Studies on Drugs and Crime 'Global Illicit Drug Trends* (2001) available at http://www.unodc.org/pdf/report_2001-06-26_1/report_2001-06-26_1.pdf, p.30

² League of Nations, Report of the Second Opium Conference, sub-committee 'B' 1924. It was reported that 'opium ceased to be a government monopoly and any person may deal in it'

³ UNODCCP, note 1, p.30

⁴ League of Nations, Permanent Central Opium Board, Pre-War Production and Distribution of Narcotic Drugs and Their Raw Materials, Geneva 1944. See UNODC (2003) *The Opium Economy in Afghanistan. An International Problem* available at <http://www.reliefweb.int/library/documents/2003/unodc-afg-31jan.pdf>, p. 88

⁵ 'Opium Production Throughout the World,' United Nations, *Bulletin on Narcotics*, Vol. 1, No.1, October 1949, p.12

⁶ Law Prohibiting Opium Cultivation, Commerce, Buying, Selling, Importation, Exportation, and Use in Afghanistan. See Vafai, note 77, chapter 3, p.32

⁷ Felbab-Brown, V. 'Kicking the opium habit?: Afghanistan's drug economy and politics since the 1980's,' June 2006 6(2), *Journal of Conflict, Security & Development*, p.128

and it was observed at an international conference in 1961 that Afghanistan had become one of the leading countries in the world 'in which narcotics constitute a serious problem.'⁸ By 1972 the situation had little changed and although production was at comparatively low levels measured against that in later decades, the International Narcotics Control Board at this time officially recognised the potential for Afghanistan to present among the greatest challenges to international control of illicit production and traffic.⁹ At this stage traditional routes of supply in the Golden Triangle countries were disrupted by the collapse of the governments and war in Vietnam and Laos. A prolonged drought in the Golden Triangle area in the late 1970's also contributed to reduce poppy production in that region, leaving a gap for Golden Crescent countries, including Afghanistan, to meet a rapidly increasing demand for opiates in Western Europe and North America. Within Afghanistan itself, resistance to Soviet occupation in 1979 resulted in the PDPA government losing control of opium producing rural areas, allowing cultivation to continue unchecked.¹⁰

Soviet invasion and civil war period: 1979-1996

As a consequence of devastation wrought on the country by the communist coup in 1978 and the Soviet invasion in 1979 ordinary agricultural production declined as irrigation systems were destroyed, livestock was depleted and large sections of the rural population fled the countryside.¹¹ The nature of normal rural enterprises changed and poppy cultivation replaced arable crops in large sections of the country,¹² not only because of the deterioration of regular agricultural trade but also of the increasing trend of factions involved in the war to rely on the narcotics trade to purchase arms. Mujahidin resistance leaders¹³ cultivated foreign patronage, particularly from the United States, and consequent financial support for their cause to consolidate their power bases and build small armies, funded in turn by investment in the production and

⁸ Bulletin on Narcotics, Vol. XIV, No.1, Jan-March 1962, p. 41

⁹ UNODCCP, note 1, p.31

¹⁰ UNODC, note 4, p. 88

¹¹ UNODCCP, note 1; the Soviet campaign led to the destruction of the infrastructure of the rural economy and a decline in food production of almost two-thirds over the period from 1979 to 1988, p.32

¹² See Hyman, A. *Afghanistan under Soviet Domination, 1964-1991* (1992) London: MacMillan. By the late 1970's opium poppy was cultivated in over half of Afghanistan's 28 provinces, p. 36.

¹³ For example, Gulbuddin Hekmatyar, Ismat Muslim and Pir Sayad Ahmed Gaylani

trafficking of opium.¹⁴ Poppy cultivation increased at a time when competing Golden Crescent countries such as Turkey, Iran and Pakistan were introducing prohibitive policies and enforcing severe counter narcotics laws. These internal and external influences coincided in the 1980's to establish Afghanistan as one of the world's leading countries in opium production and trade. By 1989 it was accounting for 35% of global opium production.¹⁵

The collapse of the country into civil war following the withdrawal of Soviet troops in 1989 resulted in the breakdown of central power and irreparable damage to centralised counter narcotic enforcement strategies and agencies. Afghanistan became a non-state 'marketing corridor'¹⁶ in which opium production expanded as competing regional politico-military factions sought to profit from the narcotics trade to support their war economies. Former mujahidin leaders used profits from the drugs trade to make the transition from guerrilla resistance fighters to political power-holders, protecting their independent strongholds with well-equipped conventional armies and using the financial gains from the drug trade to engender political support by meeting the subsistence needs of their local populations and sponsoring regional institution-building.¹⁷ The opium economy was decentralised and controlled by private actors who enjoyed unregulated and largely unfettered command over their geographical sections of the opium trade which they employed to support their own war economies.

The Taliban era: 1996-2001

The opium economy was the bedrock of warlord power between 1989 to 1994. However, its funding of civil war, and resulting promotion of lawlessness and corruption during this period contributed to increasing support for the Taliban and a weakening of warlord supremacy when the Taliban emerged as a political force in 1994. The Taliban's designs for creating a centralised Islamic nation state enjoyed considerable appeal amongst a population tired of internecine warlord fighting and political uncertainty. With a large groundswell of support the Taliban were able to control 90%

¹⁴ Felbab-Brown, note 7, p.129. See also Goodhand, note 279, chapter 3, p.408

¹⁵ UNODCCP, note 1, p.32

¹⁶ Goodhand, note 276, chapter 3, p.199

¹⁷ See Rubin, note 24, chapter 3; Rubin notes that in an interview in 1987 Mullah Nasim Akhundaza confirmed that he had established hospitals, clinics and 40 madrasas using profits from the drug trade; p.245

of the country on assuming power in 1994.¹⁸ As a result they took centralised control over opium production and trafficking, which it augmented by the establishment of new coalitions with the merchant class of the Afghan-Pakistan border to facilitate smuggling and trafficking enterprises.¹⁹ Within a short period of time the Taliban were controlling 96% of the areas under cultivation and generating approximately US\$30 million per year through taxes on the narcotics trade alone.²⁰ Cultivation remained unchecked and annual levels of production were relatively unchanged in the first four years of Taliban rule, averaging between 2,200 to 2,800 metric tonnes a year until 1999 witnessed a marked increase in production to 4,500 metric tonnes, equivalent to 79% of the total global opium output.²¹ At this stage, according to Goodhand, 'opium was a de facto legal commodity, as indicated by its cultivation on prime agricultural land.'²² Just as production was reaching these peak levels, however, the Taliban leader Mullah Omar issued a decree in August 1999 authorising all poppy farmers to reduce cultivation by one third and this, coupled with the effects of a severe drought, led to cultivation levels falling by 28% in 2000. This was followed by the imposition of a total ban on opium poppy cultivation in July 2000 on the basis of its contravention of Islamic principles, resulting in a dramatic fall in production in 2001 to 74 metric tonnes,²³ representing a mere 1.6% of the cultivation levels reached two years earlier in 1999. While it is estimated that the Taliban prohibition brought about a 90% reduction in cultivation of opium in 2001,²⁴ the ban nevertheless did not extend to exportation and it continued to be the regime's primary source of foreign exchange until its demise later that year.²⁵

The reasoning behind the Taliban's sudden change of policy from the promotion of poppy cultivation to a position of intolerance in 1999 remains unclear. The intent may have been to facilitate international negotiations at a time of Security Council imposed sanctions. Alternatively, given the theocratic nature of the regime, it may have been the result of religious motivations. In a BBC interview in November 2008, the Taliban official spokesman Zabiullah Mujahid confirmed that the Taliban interpretation of the Qu'ran was that drug production should be prohibited and it was therefore 'un-Islamic.' Mujahid claimed that for that reason they 'controlled it when in power' and 'never got

¹⁸ Goodhand, note 16, p.199

¹⁹ Goodhand, note 14, p.408

²⁰ Goodhand, note 16, p.199

²¹ UNODCCP, note 1, p.33

²² Goodhand, note 14, p.408

²³ Goodhand, note 16, p.200

²⁴ UKFCO, ADIDU paper 'Background Brief prepared by FCO for Frank Field MP'. Paper No. 070727, para 3, held on file

²⁵ UNODC, *Afghanistan Opium Survey Executive Summary Report* August 2007, available at www.unodc.org/documents/crop-monitoring/AFG07_ExSum_web.pdf, p. v

any money from drugs.²⁶ A more cynical conclusion would be that the Taliban leadership was intent on reducing production to increase prices in an effort to create a more favourable market from which they could later profit. Opium production until then had doubled under the Taliban regime between 1996 and 1999, to a peak of 4,600 tons.²⁷ Following the production ban some areas of Afghanistan witnessed a dramatic increase in opium prices, reportedly as much as ten-fold, in the period between June 2000 and February 2001.²⁸

Post-Taliban Opium Economy: 2001-2005

It was really only in the last two decades of the 20th century that the opium industry expanded and became deeply entrenched in Afghanistan. In the 1930's opium production was limited to 3 provinces. By 1994 it was conducted in 8 provinces but within 6 years this had increased to 22, representing 80% of all of the country's provinces.²⁹ This expansion had largely been the result of the collapse of the state during Soviet occupation in the 1980's and the civil war in the 1990's and the consequent inability of central government to enforce prohibitions on cultivation and trafficking. This coincided with the collapse of the economy and agricultural trade and a movement by rural households towards poppy cultivation as a means of livelihood, encouraged by ethnic warlords who were able to engage in trafficking enterprises by establishing ethnic trade links across borders.³⁰ During the Taliban period the opium trade had continued largely unchecked by central authorities as a *de-facto* legal enterprise.³¹

However, the removal of the Taliban in 2001 brought about further dramatic changes to Afghanistan's opium economy. There was a rapid resurgence in poppy cultivation, epitomised by a leap in production from 200 to 3,400 metric tons in twelve months from 2001 to 2002.³² The rise in poppy prices following the Taliban period of prohibition

²⁶ BBC interview with Zaiullah Mujahid, Taliban official spokesman 13.11.2008 available at <http://news.bbc.co.uk/1/hi/world/europe/7728430.stm>

²⁷ UNODC, note 4, p. 5

²⁸ UNODCCP, note 1, p.33; In June 2000 a kilogram sold for US\$35 and in February 2001 the same amount sold for US\$350 in Helmand p. 40. See also Goodhand, note 16; according to Goodhand opium bazaar prices peaked at US\$700 per kg in September 2001, p.201

²⁹ UNODC, note 4, p. 38

³⁰ *ibid*; for example, the Tajiks to Tajikistan, Turkmen to Turkmenistan, Pashtuns to Pakistan and Baluchis to Pakistan and Iran, p. 7

³¹ *ibid*

³² Blanchard, note 278, chapter 3, p. 102

encouraged poor farmers to plant poppy to clear their debts and wealthier farmers to turn land into profit. Furthermore, as a result of the US policy of giving money to local commanders in return for their support in the 'war on terror' the money market was flooded with millions of US dollars which were used to create loans to farmers to finance future poppy crops.³³ Between 2002 and 2004 opium cultivation increased from 3400 to 4200 metric tonnes.³⁴ By 2004 opium cultivation was taking place in all of Afghanistan's 32 provinces and had increased to an unprecedented 131,000 hectares, a rise of 64% from levels in 2003.³⁵ Afghanistan was producing 4,200 metric tonnes of opium, accounting for 87% of global poppy cultivation.³⁶ A smaller crop in 2005 produced a similar amount due to more favourable weather and environmental conditions.³⁷

³³ Goodhand, note 14, p.409

³⁴ UNODC, *World Drug Report 2005* available at http://www.unodc.org/pdf/WDR_2005/volume_2_chap5_opium.pdf, p.181

³⁵ *ibid*, p.179. In 2005 the Afghan government reorganised the country's administrative division into 34 provinces

³⁶ *Ibid*, p.39

³⁷ Blanchard, note 32, p.99

**INTERIM CRIMINAL CODE FOR COURTS
2004**

INDEX

| | |
|------------------|--|
| <i>Chapter 1</i> | <i>General Provisions</i> |
| Article 1 | Applicable Rules |
| Article 2 | Record of Procedural Activities |
| Article 3 | Terms |
| Article 4 | Presumption of Innocence |
| Article 5 | Suspect and Accused |
| Article 6 | Duration of Provisional Arrest |
| Article 7 | Exclusionary Rule |
| Article 8 | Final Decision |
| Article 9 | Denunciation of Forgery |
| Article 10 | Abstention and disqualification of the Saranwal |
| Article 11 | Abstention of the Judge |
| Article 12 | Disqualification of the Judge |
| Article 13 | Definition of Flagrante Delicto |
| Article 14 | Joinder and Severance of Cases |
| Article 15 | Procedural Nullity and Consequences |
| Article 16 | Procedural Invalidities and their Consequences |
| Article 17 | General Rules for Notifications |
| | |
| <i>Chapter 2</i> | <i>Common Provisions for the Suspect and the Accused</i> |
| Article 18 | Defense Counsel |
| Article 19 | Legal Aid |
| Article 20 | Interpreter |
| | |
| <i>Chapter 3</i> | <i>Reporting of Crimes and Role of the Saranwal</i> |
| Article 21 | Reporting of Crimes |
| Article 22 | Institution of Proceedings |
| Article 23 | Investigations |
| Article 24 | Transfer of the Investigation |
| | |
| <i>Chapter 4</i> | <i>Jurisdiction of the Courts</i> |
| Article 25 | Jurisdiction on crimes |
| Article 26 | Territorial Jurisdiction |
| Article 27 | Conflict Between Two Courts |
| | |
| <i>Chapter 5</i> | <i>Duties and Jurisdiction of Judicial Police</i> |
| Article 28 | Categories of Judicial Police Officers |
| Article 29 | Role of Judicial Police |
| Article 30 | Judicial Police's Arrest |
| Article 31 | Judicial Police's Interrogation |
| Article 32 | Judicial Police's Urgent Activities |
| | |
| <i>Chapter 6</i> | <i>Investigation Performed by the Saranwal</i> |
| Article 33 | Ratification of the Police's Decisions |

| | |
|----------------------|---|
| Article 34 | Interrogation of the Person Arrested |
| Article 35 | Arrest and Seizures by the Primary Saranwal |
| Article 36 | Terms for Indictment in Case of Arrest |
| Article 37 | Collection of Evidence |
| Article 38 | Defense Counsel Presence |
| Article 39 | Conclusion of the Investigation |
| <i>Chapter 7</i> | <i>Notification of the Deeds and Representation During the Investigations</i> |
| Article 40 | Notification on the suspect |
| Article 41 | Notification on the Not Found Suspect and his Representation |
| <i>Chapter 8</i> | <i>The Trial</i> |
| Article 42 | Preparation of the Trial |
| Article 43 | Access of the Accused to the Findings of the Investigation |
| Article 44 | Mental Insane Accused |
| Article 45 | Accused's Obligation to Appear |
| Article 46 | Trial in Absence of the Not Found Accused |
| Article 47 | Trial in Absence of the Summoned Accused |
| Article 48 | Hearings in Progress |
| Article 49 | Attendance of Witnesses and Experts |
| Article 50 | Oaths |
| Article 51 | Admission of Witnesses and Experts |
| Article 52 | Order of the Hearing |
| Article 53 | Conduct of the Hearing |
| Article 54 | Exemption from Testimony |
| Article 55 | Evidentiary Value of Investigative Activities |
| Article 56 | Concurrent Crimes and Circumstances |
| Article 57 | Different Definition of the Crime |
| Article 58 | Conclusion of the Trial |
| Article 59 | Decision of the Court |
| Article 60 | Order of Arrest in the Decision |
| Article 61 | Requirements of the Decision |
| Article 62 | Payment of Expenses of the Procedure |
| <i>Chapter 9</i> | <i>Appeal Procedure</i> |
| Article 63 | Appeal against the Decision of the Primary Court |
| Article 64 | Stay of the Procedure and Appeal of the decision in case of the not found accused |
| Article 65 | Modalities of the Appeal |
| Article 66 | Content of Appeal |
| Article 67 | Introductory Activities to the Appeal Trial |
| Article 68 | Powers of the Court of Appeal |
| Article 69 | Appeal Hearing |
| Article 70 | Decision of the Court of Appeal |

| | |
|-----------------------|---|
| <i>Chapter 10</i> | <i>Recourse to the Supreme Court</i> |
| Article 71 | Recourse against the Decision of the Court of Appeal |
| Article 72 | Terms of the Recourse |
| Article 73 | Modalities of the Recourse |
| Article 74 | Introductory Activities to the Supreme Court Trial |
| Article 75 | Supreme Court Hearing |
| Article 76 | Reject of the Recourse |
| Article 77 | Amendment of the Protested Decision |
| Article 78 | Decision of the Supreme Court without Referral |
| Article 79 | Referral to the Court of Appeal |
| Article 80 | Scope of the Supreme Court Decision |
| <i>Chapter 11</i> | <i>Review of Court Sentences</i> |
| Article 81 | Cases of Revision |
| Article 82 | Right to Revision |
| Article 83 | Revision Procedure |
| <i>Chapter 12</i> | <i>Execution of Courts' Final Decisions</i> |
| Article 84 | Authority Responsible for Execution |
| Article 85 | Execution of Prison Punishments |
| Article 86 | Execution of Sanctions Alternative to Imprisonment |
| Article 87 | Execution of Fines |
| Article 88 | Execution of Decisions for Confiscation of Objects and Assets |
| Article 89 | Special Provisions for the Execution |
| <i>Chapter 13</i> | <i>Conditional Release</i> |
| Article 90 | Definition |
| Article 91 | Conditions |
| Article 92 | Revocation |
| Article 93 | Procedure |
| <i>Chapter 14</i> | <i>Problems of Execution</i> |
| Article 94 | Competence and Procedure |
| Article 95 | Disputes on Property |
| <i>Chapter 15</i> | <i>Miscellaneous Provisions</i> |
| Article 96 | Interim Defense Counsel |
| Article 97 | Districts with no Functioning or Established Courts |
| Article 98 | Effective Date and Duration |

INTERIM CRIMINAL CODE FOR COURTS

Chapter 1 General Provisions

Article 1 Applicable Rules

1. Three judges shall be assigned to every primary court. One of them as President of the Court. In places where the said team cannot be deployed because of lack of availability or security reasons, one judge shall be assigned thereto, functioning as a monocratic court. The decision to deploy one judge to a district as a monocratic court is made by the President of the Provincial Court.

Article 2 Record of Procedural Activities

1. All the activities accomplished in execution of the provisions of this code shall be recorded in written form by a public officer.
 - a. The judicial police activities shall be recorded by a police officer taking part in the operations.
 - b. The Saranwal activities shall be recorded by a secretary of the office.
 - c. The activities of the judges shall be recorded by a clerk.
2. The activities which are mentioned in paragraph 1 of this article include a full text or a terse compilation of the statements of the suspect, accused, victim, expert and witness as well as the description of the expert's activities and the running of the hearings.
3. The records of the statements of the suspect, accused, victim and witness shall be undersigned by them or when the person is unable to do so signed by finger prints.
4. In case the latter refuse or are unable to sign, the public officer responsible for the recording shall mention the circumstances.
5. The above mentioned records constitute official documents.
6. The lack of recording, apart possible disciplinary actions against the responsible of the omission brings about the legal inexistence of the related activities.

Article 3 Terms

1. The procedural terms are indicated by hours or days.
2. When a term established by days expires on a holiday it is extended to the following working day.
3. In the calculation of the duration of the term the hour or the day of commencement shall not be included.
4. The final day term for filing a document or accomplishing any procedural activity expires at the hour of closure of business of the related office as established by the home rules.

Article 4 Presumption of Innocence

1. From the moment of the introduction of the penal action until when the criminal responsibility has been assessed by a final decision the person is presumed innocent. Therefore decisions involving deprivations or limitations of human rights must be strictly confined to the need of collecting evidence and establishing the truth.

Article 5 Suspect and Accused

1. A person is considered a suspect when in any deed of the investigations the commission of a crime is attributed to him.
2. A person is considered an accused when an act of indictment has been enacted by the Saranwal according to paragraph 4 of article 39.
3. The quality of accused remains until when the person is discharged or sentenced by a final decision.
4. The suspect and the accused shall not undergo intimidations or any form of physical or psychological pressure.
5. Their statements shall be made in a condition of absolute moral freedom.
6. The suspect and the accused have the right to abstain from making any statement even when they are questioned by the relevant police or judicial authorities.
7. The police, the Saranwal and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or her right to remain silent, right to representation at all times by defense counsel, and right to be present during searches, line-ups, expert examinations and trial.
8. The words or terms “suspect” and “accused” also include in their definition his/her defense counsel.

Article 6 Duration of Provisional Arrest

1. The terms for the duration of provisional detention following the arrest during the investigative phase are those established in article 36.
2. During the trial at the Primary level, the Court can extend the detention for two additional months; during the trial at the appeal level the Court can extend the detention for another two months term; during the trial before the Supreme Court the detention can be further extended by the same Court for additional five months.
3. Whether during the celebration of the above mentioned trials the related terms expire, the arrested person shall be released.

Article 7 Exclusionary Rule

1. The evidence which has been collected without respect of the legal requirements indicated in the law is considered invalid and the Court cannot base its judgment on it.

Article 8 Final Decision

1. The decision of the Primary Court is final if a valid appeal has not been filed within the term prescribed by the law.
2. The decision of the Court of Appeal is final if recourse to the Supreme Court has not been filed within the term prescribed by the law.
3. The decision of the Supreme Court is final.
4. The Saranwal at the Primary Court shall give execution to the final decisions. To this end the Court of Appeal and the Supreme Court shall deliver to the Saranwal at the Primary Court that adopted the initial decision the file containing the procedural documents and the objects confiscated.

Article 9 Denunciation of Forgery

1. In every phase of the proceeding, the suspect, the accused and the victim can denounce the forgery of a document considered among the evidence material.
2. The denunciation is submitted to the Primary Saranwal during the investigations and to the Court in the successive phases and degrees.
3. The Saranwal is also entitled to make the denunciation of forgery to the Court.
4. If the investigating Primary Saranwal or the Court deems the denunciation grounded the procedure is stayed. In this case the same Saranwal during the investigation phase or the competent Saranwal to whom the document shall be transmitted introduces the penal action for forgery.
5. The proceedings are resumed when the issue has been settled by a final decision.
6. Otherwise the proceedings are not discontinued and the document in question is delivered after the final decision to the Primary Saranwal for the adoption of the decisions belonging to his competence.
7. In the decision that rejects the denunciation of forgery the suspect or accused that made the case can be sentenced according to provisions of law.

Article 10 Abstention and disqualification of the Saranwal

1. The primary Saranwal is entitled to request his superior to make him abstaining from the investigations when he believes that there are grounded reasons to do so.
2. The suspect has the right to request the higher Saranwal to exonerate the primary Saranwal conducting the investigations against him, presenting the evidence of the occurrence of the grounded reasons indicated in paragraph 1.

3. The superior Saranwal can decide to authorize the abstention of the Primary Saranwal or exonerate him accepting his request or responding to a complaint of the suspect when there are grounded reasons to do so.
4. When the superior Saranwal has authorized the abstention of the Primary Saranwal or has exonerated him, shall substitute the same.

Article 11 Abstention of the Judge

1. A judge cannot handle the case if:
 - a. the crime was committed against him or his relatives;
 - b. he has performed the duties of the judicial police, of the Saranwal or has given witness or functioned as an expert in the same case;
 - c. he has been defense counsel of the accused.
2. When the cases indicated in paragraph 1 occur, the judge of a single member court shall request the President of the Provincial Court to authorize him to abstain.
3. When the cases indicated in paragraph 1 occur to a judge member of a collegial court, then he or she shall request the President of the Court to authorize him or her to abstain.
4. When the cases indicated in paragraph 1 occur to the President of a collegial court, he or she shall request the President of the next higher court to authorize him or her to abstain.
5. The President of the appropriate level Court either accepts or rejects the request. This decision cannot be protested.
6. When the President of the appropriate level Court authorizes the abstention, he or she shall substitute the requesting judge or President for the handling of the case.
7. Pending the decision, the criminal procedures shall be stayed.

Article 12 Disqualification of the Judge

1. The accused or the Saranwal can request the disqualification of a judge or a President when he/she thinks that one of the cases indicated in paragraph 1 of art. 11 occurs.
The request shall be addressed according to the case to the appropriate President indicated in paragraph 2, 3 and 4 of art. 11.
The president either accepts or rejects the request.
2. In case of acceptance, the President of the appropriate level Court shall substitute the disqualified judge or President. This decision cannot be protested.
5. Pending the decision, the criminal procedures shall be stayed.

Article 13 Definition of Flagrante Delicto

1. A crime is considered flagrante delicto in the moment in which is committed.
2. The perpetrator who is caught during the commission of crime is in a state of "flagrante delicto."

3. It is considered also in state of flagrante delicto the perpetrator when, upon the commission of the crime, is immediately pursued by the police, or the victim or other persons.

Article 14 Joinder and Severance of Cases

1. The Primary Saranwal or the Court can join different cases when:
 - a. a suspect or an accused is alleged of having committed more than one crime;
 - b. different investigations or trials are conducted in relation to accomplices in the same crime;
 - c. the same evidence is relevant for different crimes.
2. The primary Saranwal and the Court can sever joint cases when:
 - a. this contributes to a more expeditious handling of them;
 - b. adults and minors are accomplices in the same crime.

Article 15 Procedural Nullity and Consequences

1. The criminal procedure is considered null and so declared, even ex officio, when:
 - a. The persons who have acted as judges or Saranwal did not possess the related legal status;
 - b. The procedure has not been instituted by the Saranwal and when he has not been present in cases in which his presence is mandatory.

Article 16 Procedural Invalidities and their Consequences

1. All the violations of procedural provisions different from those indicated in the previous article bring about the invalidity of the procedure only if they are denounced by the interested party.
2. When the denunciation is made during the investigations or the trials the responsible judicial authority shall make decisions to redress the procedure whenever possible.
3. In any case the denunciation can be made in the appeal or in the recourse to the Supreme Court.
4. The Court of Appeal or the Supreme Court declares the invalidity of the procedure whenever it appears that the violations of procedural provisions have provoked relevant distortions in the decision of the case.

Article 17 General Rules for Notifications

1. The notifications are served by the judicial police that shall give the requesting judicial organs a report on the service rendered.
2. The notifications are served in the domicile of the concerned person in his hands or in the hands of an adult relative or cohabitant. Should this not be possible, a copy of the deed is left at his dwelling place.

3. When the person is under arrest the notification is served on him through the Director of the prison.
4. When it has not been possible to locate the domicile of the concerned person, the judicial police shall conduct accurate investigations aimed at identifying the places where the person lives or works. In case the search for finding these places proves fruitless, the notification deed shall be delivered to the administrative organ of the place considered as the person's last place of residence.

Chapter 2 Common Provisions for the Suspect and the Accused

Article 18 Defense Counsel

1. Legal assistance to the suspect and the accused requires the service of a qualified professional.
2. To this end an official register is established in the Ministry of Justice where only persons with a university degree in law or sharia can be included.
3. The suspect and the accused can be, in any case, assisted by a defense counsel of their choice.

Article 19 Legal Aid

1. The suspect or the accused be financially unable to appoint a defense attorney are entitled to have a free defense attorney appointed for him or her in the following manner:
 - a. The investigating Saranwal or the Court adjudicating the case, on the petition of the person, appoints a defense attorney for the destitute person from amongst the lawyers officially permitted to work as defense attorney.
 - b. The person for whom an attorney has been appointed reserves the right not to accept the appointed defense attorney and to defend himself in person.
 - c. The fees of the aforesaid attorney shall be paid from the State budget and its extent shall be fixed by regulation.

Article 20 Interpreter

1. The suspect or the accused who does not know the language used during the investigations and the trials or who is deaf, dumb or deaf and dumb shall be given an interpreter for, at least, explaining to him the charge and the indictment and for assisting him during the interrogations and confrontations.

Chapter 3 Reporting of Crimes and Role of the Saranwal

Article 21 Reporting of Crimes

1. Police are duty bound to report within 24 hours to the Primary Saranwal all the crimes they happen to know.
2. Public officers are duty bound to report crimes ascertained in the performance of their duties.
3. Private citizens are duty bound to report to the judicial police or the Primary Saranwal only crimes against internal and external security.

Article 22 Institution of Proceedings

1. The Primary Saranwal has the obligation to introduce the penal action for prosecution of all crimes, known directly by him or reported to him, committed in the territory of the District, unless otherwise expressly provided by law.
2. The Saranwal shall not dismiss or stay a case except as otherwise provided by the law.

Article 23 Investigations

1. The Primary Saranwal performs the investigation activities by his own or making recourse to the collaboration of the judicial police.
2. The purpose of the criminal investigation is the establishment of the truth and in order to do so the Primary Saranwal shall extend his assessment to cover all facts and evidence relevant for establishing whether the crime has been committed and ascertaining who is responsible for it.
3. In conducting the investigations the Primary Saranwal is duty bound to evaluate incriminating and exonerating circumstances equally and to respect the interest of the victims.

Article 24 Transfer of the Investigation

1. When in the course of the investigations it appears that the competence belongs to another District the Primary Saranwal shall transfer the case to the latter.
2. The suspect who deems that the competence belongs to a different Primary Saranwal can submit to the investigating Primary Saranwal a request for transfer.
3. Should the Primary Saranwal refuse to transfer, the suspect can file a complaint to the higher Saranwal, whose decision cannot be protested.

Chapter 4 Jurisdiction of the Courts

Article 25 Jurisdiction on crimes

1. The District Courts are competent for adjudicating petty, misdemeanors and felony crimes according to the provisions of the law.

Article 26 Territorial Jurisdiction

1. The territorial jurisdiction is determined by the place where the crime is committed.
2. In case of attempt crime the competence belongs to the Court which has jurisdiction on the place where the last action for the commission of the crime has been accomplished.
3. In case of continuing or permanent crime the competence belongs to the Court having jurisdiction on the place where the continuation or the permanence ceased.
4. When an accused is to be adjudicated for more than one crime, the territorial competence belongs to the Court having jurisdiction in the venue where the most serious crime has been committed.
5. When the Court realizes that in cases of multiple crimes committed by the accused the most serious crime has been committed in another venue, it shall transfer the procedure to the court having jurisdiction in that venue.

Article 27 Conflict between Two Courts

1. When between two District Courts located in the same Province raises a conflict on the attribution of territorial jurisdiction, the case is ruled by the President of the Provincial Court.
2. When the said conflict raises between Courts in different Provinces, the case is ruled by the Supreme Court.
3. The settlement of the territorial jurisdiction conflict is made at the request of one of the conflicting Courts or of the related Saranwal.
4. The decision settling the conflict is notified to the competent Court.

Chapter 5 Duties and Jurisdiction of Judicial Police

Article 28 Categories of Judicial Police Officers

1. Judicial police are categorized as follows:
 - a. the Judicial police's commissioned officers are the superior ranks of the State police;
 - b. the ordinary officers of the judicial police are the low ranks of the State police.
2. Special laws can attribute the functions of judicial police to other public officers.

Article 29 Role of Judicial Police

1. The judicial police perform their duties under the direction and supervision of the Saranwal.
2. The judicial police have the role of detecting crimes, collecting evidence, and seeking suspects in the pursuit of justice.

Article 30 Judicial Police's Arrest

1. The judicial police shall arrest on their own initiative: a) the offender who is caught in state of flagrante delicto of misdemeanors, punished by medium term imprisonment, or felony; b) the person who is allegedly the author of a felony and there is risk of his disappearance.
2. In all other circumstances, the judicial police perform arrests only in execution of orders of the judicial authorities.

Article 31 Judicial Police's Interrogation

1. The judicial police, after having identified the person arrested on their own initiative, inform him of the reasons of the arrest and interrogate the same about the crime and its circumstances within a maximum of twenty-four hours.
2. Immediately after a report shall be sent to the Primary Saranwal and the person shall be put at his disposal.

Article 32 Judicial Police's Urgent Activities

1. In case of flagrante delicto and whenever there are grounded reasons to believe that urgent action is needed to preserve the evidence the judicial police can, on their own initiative, conduct preliminary investigations which include:
 - a. personal frisks or searches of premises and other places;
 - b. seizure of objects and documents;
 - c. inspection of persons and places, taking photos;
 - d. requesting the assistance of experts for performing activities which require special professional qualification.
2. Immediately after having performed the above listed activities, the judicial police shall send a report to the Primary Saranwal.
3. Defense Counsel of suspect and accused has the right to be present in investigation and interrogation phases according to art. 38 of this code.

Chapter 6 Investigation Performed by the Saranwal

Article 33 Ratification of the Police's Decisions

1. The Primary Saranwal immediately after having been informed about the judicial police's activities indicated in articles 30, 31 and 32 either sanctions the deeds of the judicial police's activities or adopts decisions to revoke or modify them.
2. Before taking the actions mentioned in the previous paragraph the Saranwal can ask the police to provide explanations.

Article 34 Interrogation of the Person Arrested

1. The Primary Saranwal shall interrogate the person arrested within forty-eight hours from the moment when the person has been put at his disposal.
2. The Primary Saranwal can release the arrested suspect whenever he deems no more necessary the deprivation of liberty.

Article 35 Arrest and Seizures by the Primary Saranwal

1. In the course of the investigations activities the Primary Saranwal can order the arrest of the alleged author of a misdemeanor punishable by medium term imprisonment or felony and seizure of items and goods connected with the crime.
2. The person arrested shall be interrogated within forty-eight hours.

Article 36 Terms for Indictment in Case of Arrest

1. When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the Court within fifteen days from the moment of the arrest except when the Court, at the timely request of the Saranwal, has authorized the extension of the term for not more than fifteen additional days.

Article 37 Collection of Evidence

1. During the investigations phase the Primary Saranwal shall collect all relevant evidence which can substantiate a decision pros or cons the suspect.
2. The collection of evidence is not restricted to particular forms or matters. The Primary Saranwal is free in selecting tools and modalities of proof.
3. The following shall be considered as key tools:
 - a. Witnesses
 - b. Confrontations
 - c. Line up procedures
 - d. Inspections
 - e. Searches
 - f. Seizure

- g. Expert exams and evaluations
- h. Interrogations

Article 38 Defense Counsel Presence

1. The defense counsel has the right to be present at all times during the interrogation of the suspect.
2. The suspect and the defense counsel have the right to be present during searches, confrontations, line-up procedures and expert examinations as well as during the trial.
3. In the investigation phase the Saranwal and the judicial police shall notify the suspect and his defense counsel of searches, confrontations, line-up procedures and expert examinations in order to allow them to be present. This duty can be waived only when there is an urgent need to conduct the said operations, which is defined as when it is a flagrante delicto crime or there is a fear of the loss of evidential facts.

Article 39 Conclusion of the Investigation

1. At the conclusion of the investigations phase, if the Primary Saranwal deems that there is not grounded evidence dismisses the case.
2. The victim or higher Saranwal can file a complaint to the Court against this decision within ten days.
3. The Court, after having examined the case, can confirm the decision of the Saranwal or vice versa request him to lodge the indictment.
4. In any other case the Saranwal shall submit to the Court the act of indictment requesting the assessment by trial of the criminal responsibility of the indicted person.
5. The act of indictment is comprised of the following:
 - a. Complete identification of the suspect;
 - b. Complete description of the crime.
6. Together with the act of indictment the Primary Saranwal shall transmit to the Court the file containing all the deeds formed during the investigations, putting at the Court's disposal the seized items and goods.

Chapter 7 Notification of the Deeds and Representation During the Investigations

Article 40 Notification on the suspect

1. During the investigations the judicial police and the Saranwal shall give notifications of the deeds to the suspect, to his defense counsel and the victim of the activities to be accomplished, to which they have the right to be present.
2. If there are no particular grounded reasons of urgency, the notification should be served at least three days before the performance of the activity.
3. Reasons of urgency imposing a shorter period or absence of notifications shall be clearly mentioned in the record of the activities.

Article 41 Notification on the Not Found Suspect and his Representation

1. When it has not been possible to identify any of the places indicated in article 17, the notifications shall be served on a defense counsel appointed by the police during their autonomous investigations, or by the Saranwal during his investigations.
2. The appointment of the defense counsel is made by the police and the Saranwal in a written form.
3. In this case the defense counsel represents the suspect.
4. The above indicated decision ceases to take effect at the end of the investigations.

Chapter 8 The Trial

Article 42 Preparation of the Trial

1. The Court immediately after having received the act of indictment, orders the notification of the deed indicating the day and hour fixed for the commencement of the trial.
2. The deed shall contain the name of the accused and the indication of the alleged crime with its factual circumstances in reference to the related law provisions and shall be served on the accused and his defense counsel, the victim and the Saranwal at least five days in advance.

Article 43 Access of the Accused to the Findings of the Investigation

1. The accused and his defense counsel are entitled to examine the documents contained in the file mentioned in the last paragraph of article 39 and the objects under seizure.

Article 44 Mental Insane Accused

1. If during the trial it appears that the accused suffers of a mental illness which prevents him from the possibility of defense, the Court either ex officio or at the request of the Primary Saranwal stays the proceeding submitting the accused to mental examination.
2. Should examination confirm the above indicated mental state, the resumption of the proceedings is postponed until the suspect recovers.
3. In case the accused is later on sentenced to imprisonment, the time spent in a close institution for the mental examination is detracted from the prison term.

Article 45 Accused's Obligation to Appear

1. The accused, either under detention or at liberty, shall be obliged to appear before the court when confrontations or experiments involving his physical presence are scheduled.
2. The accused at liberty refusing to appear in the instances indicated in the previous paragraph shall be accompanied by the police.

Article 46 Trial in Absence of the Not Found Accused

1. When it has not been possible to serve the notifications on the accused in any of the forms provided for in article 17, because none of the places there indicated are known, the Court shall issue a decree stating that the accused cannot be found, appointing a defense counsel for him.
2. Later on the notifications shall be served on the defense counsel.

3. Notifications made in this way are valid to all intents and purposes. The accused that cannot be found is represented by the defense counsel.
4. The decree indicated in the first paragraph ceases to take effect at the end of the degree in which has been issued and shall be re-issued in each of the following degrees.
5. Every decree must be preceded by a new search in the places indicated in article 17.

Article 47 Trial in Absence of the Summoned Accused

1. When the notification indicated in article 42 has been delivered to the accused and he does not appear, the judge appoints a defense counsel for him.
2. Notifications continue to be served on the accused following the provisions of article 17.

Article 48 Hearings in Progress

1. When the trial requires more than one hearing, the Court fixes the date and hour of the successive hearing, giving verbal notice to the accused, the defense counsel and the other persons who have to appear.

Article 49 Attendance of Witnesses and Experts

1. Witnesses and experts are duty bound to be present in the hearing indicated in the notification served on them.
2. If they do not appear without grounded justifications the Court orders their accompaniment by the police imposing on them a fine up to 500 Afghani.

Article 50 Oaths

1. Witnesses who have completed fourteen years of age are duty bound to swear, before giving evidence in Allah's name to tell the truth and be honest in their testimony.
2. If the witness has used the term "Ash-ha-do" knowing that the term itself implies taking an oath, he or she is not required to swear in that terms. However, it is permissible for information gathering to hear the testimony of a witness under fourteen years of age without making him take the oath of truthfulness.

Article 51 Admission of Witnesses and Experts

1. The Primary Saranwal submits to the Court the list of the witnesses and experts he wants to be heard together with the act of indictment, indicating the reasons of the relevance of their testimony and exams.
2. The accused and/or his defense counsel have the right to present their own lists of witnesses and experts indicating the reasons of the relevance of their testimony and exams.

3. The Court can exclude those witnesses or experts that in its view do not appear material for the adjudication of the case.
4. The Court, on its own initiative, can order the appearance of witnesses or experts who are not included in the above mentioned lists.

Article 52 Order of the Hearing

1. The order of the hearing is explained to the persons present by the Head of the Court.
2. The court keeps the order of the hearing. Hearings are open to the public except when the court decides that all or part of it shall be run without the presence of the public for reasons of morality, family confidentiality or public order.
3. The Primary Saranwal, the accused and his defense counsel have the right to be always present.
4. The accused that with his behavior disrupts the proceedings can be excluded by the Court for part or all the duration of the hearing. He is anyhow readmitted in the room when the verdict is read out.

Article 53 Conduct of the Hearing

1. The Primary Saranwal is duty bound to take part in the hearing.
2. The accused and his defense counsel have the right to be present.
3. The Court proceedings are conducted according to the following order:
 - a. At the opening of the hearing the Court reads out the act of indictment;
 - b. When the accused is under detention the Court shall immediately assess the legality of the arrest and order the liberation of the accused when realizes that the arrest was unlawful or not necessary;
 - c. The Primary Saranwal makes an oral presentation of the case and of the findings of the investigations;
 - d. The judicial police officers who have conducted the investigations make oral reports of the activities accomplished;
 - e. The first witness to be heard is the victim;
 - f. Then the other witnesses and the experts are heard;
 - g. The accused can testify if he does not avail himself of the right to remain silent and the accused or his defense counsel can ask questions to the witnesses and the experts;
 - h. In case the witness cannot be present for health reasons the Court can hear him in his domicile;
 - i. The primary Saranwal and the defense lawyer can ask question to the accused.
4. The Court can, at any time, address questions to the accused, to any witness in the hearing and order confrontations.
5. The accused can refuse to answer the questions of the Court consistent with his right to remain silent.

Article 54 Exemption from Testimony

1. Spouses have the right not to give evidence against each other, even though their marital relation be ended.
2. The accused's ancestors and descendants and their relatives of second degree have the right to avoid testifying against one another except when:
 - a. the charge legally attributed to the accused is not committed against the witness himself; or
 - b. they reported the criminal offense.

Article 55 Evidentiary Value of Investigative Activities

1. The records of the testimonies of the witnesses as well as of the expert exams, collected during the investigative phase, can have the value of evidence as basis for the decision only if it results that the accused and/or his defense counsel were present during the operations and were in a position to raise questions and make objections.
2. Otherwise the related deeds have the sole value of clues.

Article 56 Concurrent Crimes and Circumstances

1. If from the deeds of the investigations or during the trial it results that there are alleged additional crimes and/or facts contributing as aggravating circumstances which have not been included in the act of indictment the Court, at the request of the Primary Saranwal, makes the related accusation to the accused and/or to his defense counsel, when present, giving them adequate time to prepare the defense.

Article 57 Different Definition of the Crime

When the Court deems that the crime is to be given a different definition from that indicated in the act of indictment on the basis of the same facts and circumstances included in the accusation shall grant the accused and the defense counsel a time allowance for presenting a defense vis-à-vis the change in the definition.

Article 58 Conclusion of the Trial

1. At the conclusion of the operations indicated in the previous articles, the Primary Saranwal expresses his opinion requesting the Court to make a decision of dismissal or sentence, indicating the kind and the amount of punishment he deems adequate.
2. The accused or the defense counsel, when present, submits to the Court arguments in rebuttal of the accusation.

Article 59 Decision of the Court

1. At the completion of the activities, the Court declares the closing of the hearing and leaves the trial room for writing down 'in chamber' the decision of the case.
2. Later on, the Court enters the trial room again and reads out the verdict together with its reasons. This reading has the value of notification. If the reasons of the verdict are not read out by the Court in the same context, they shall be deposited in the office of the secretary of the Court within fifteen days from the moment of the decision.
3. The Primary Saranwal, the accused and his defense counsel shall receive notification of the deposit indicated in paragraph 2 of this article.
4. The accused tried in absentia, in the case of article 47, shall receive notification of the decision read out by the Court together with the reasons deposited later on in the office of the secretary of the Court.
5. The notification indicated in the previous paragraph is served on the defense counsel of the accused in the case of article 46.

Article 60 Order of Arrest in the Decision

1. When the Court decides to impose a sentence of more than three years of imprisonment in the same decision can include an order of arrest.

Article 61 Requirements of the Decision

1. The decision shall contain:
 - a. The identification of the accused;
 - b. The description of the facts and of the circumstances included in the accusation;
 - c. A terse exposition of the reasons of the same decision with reference to facts and law provisions;
 - d. The verdict

Article 62 Payment of Expenses of the Procedure

1. In imposing the sentence, the Court shall also order that the sentenced person pays the expenses incurred during the procedure.
2. If the related amount cannot be specified in that moment the order shall be given in generic terms mandating the administrative office to make the calculation.

Chapter 9 Appeal Procedure

Article 63 Appeal against the Decision of the Primary Court

1. The person who has been sentenced or the Primary Saranwal can contest the decision of the Court by filing an appeal.
2. The competent Court of Appeal is the Provincial Court.
3. The act of appeal shall be deposited with the secretary of the Court, which has made the decision, or with the secretary of the competent Court of Appeal within twenty days from the moments in which:
 - a. The Court has read out in the Court room, in the same context, the verdict and its reasons at the conclusion of a trial in which the accused and/or his defense council were present;
 - b. The reasons of the verdict, which were not read out together with the verdict, have been notified to the accused and to the defense counsel; in this case the second notification is considered the beginning of the term;
 - c. The accused tried in absentia has received the notification of the decision.
4. When in the same decision more than one person has been sentenced the last notification is considered the beginning of the term for all sentenced.

Article 64 Stay of the Procedure and Appeal of the decision in case of the not found accused

1. After the decision of the court in case of the not found accused the procedure stays until when the accused personally or the defense counsel delegated by him/her lays down an appeal.
2. In this case the beginning of the appeal term starts for the accused from the moment in which the same has been found and also a notification according to article 17 has been delivered to him/her.
3. The beginning of the appeal term starts for the Saranwal from the moment in which the Court notifies him about the notification delivered to the accused.
4. If the accused and the Saranwal do not lay down an appeal during the said term the decision becomes final.

Article 65 Modalities of the Appeal

1. The act of appeal shall be signed by the accused or by his defense counsel when the latter has represented the accused during the trial or by the Primary Saranwal.
2. The secretary of the Court receiving the act of appeal has to register it specifying the date and hour of the delivery.
3. If the accused who wants to file the appeal and delivers a written text is unable to sign it because illiterate or for any other reason he/she can fingerprint it and the secretary of the Court shall certify this in the register.
4. If an illiterate person wants to file an appeal but is not in a position to present a written text, the secretary of the Court shall write down in the register his verbal statements.

Article 66 Content of Appeal

1. The act of appeal shall contain the indication of the contested decision and expose the reasons according to which the decision is considered wrong.
2. The denunciation of the errors of the decision shall make reference to:
 - a. Wrong application of the law and definition of crime;
 - b. Wrong evaluation of facts and circumstances;
 - c. Wrong application of the penalty and/or of its amount.

Article 67 Introductory Activities to the Appeal Trial

1. When the act of appeal has been deposited with the secretary of the Court which has made the contested decision, he shall immediately transmit to the Provincial Court the act of appeal deposited with him, and a copy of the related annotations on the register.
2. In the same time he shall forward to the Provincial Court the file containing all documents produced in the previous procedural phases, and the objects and documents seized.
3. When the act of appeal has been deposited with the secretary of the competent court of appeal, the President of the Provincial Court shall request the secretary of the court, which has made the contested decision to transmit the file containing the documents produced in the previous procedural phases, the objects and documents seized.
4. The President of the Provincial Court, upon reception of the above indicated material, shall fix the date and hour of the hearing for discussing the appeal and shall order the police to notify to the appellant and the Provincial Saranwal his decision. Similar notification shall be made to the appealing Primary Saranwal and to the adjudicated person in case the appeal was filed by the Primary Saranwal.
5. The notification shall be served to the accused, the adjudicated person and the primary Saranwal at least five days before the date of the hearing.
6. The Provincial Saranwal, the accused, the adjudicated person and defense counsels have the right to consult the documents and to vision the seized material.

Article 68 Powers of the Court of Appeal

1. The Court of Appeal shall confine its review to the points of the decision to which the act of appeal makes reference.
2. When the Appeal is filed by the primary Saranwal the Court can:
 - a. impose punishment in the case the accused was found not guilty in the Primary Court;
 - b. increase the punishment in the case the decision was founded on an error in the interpretation or application of the law.
3. When the appeal is filed only by the accused the Court can in no case increase the punishment inflicted by the Primary Court.

Article 69 Appeal Hearing

1. Whether the Court of Appeal deems that the activities accomplished in the previous procedure are not sufficient for making a sound decision, it can hear the witnesses and experts already appeared in the Primary Court and collect new documents and explore new proofs.
2. Otherwise the Court makes its decision on the basis of the existing material and of the arguments presented during the discussion.

Article 70 Decision of the Court of Appeal

1. The appeal is rejected if it has not been filed within the established term.
2. The decision of the Court of Appeal can confirm or modify in all or in part the previous decision.
3. In the verdict the Court can order the arrest of the accused or release the accused under arrest.
4. The provisions of article 59 are applicable.

Chapter 10 Recourse to the Supreme Court

Article 71 Recourse against the Decision of the Court of Appeal

1. The person sentenced by the Court of Appeal, the victim or the Saranwal can lodge a recourse to the Supreme Court only if the complaint refers to:
 - a. Violations in the application of the law or wrong interpretation of the law; and
 - b. A decision based on the provisions of article 7.

Article 72 Terms of the Recourse

1. The act of recourse shall be deposited with the secretary of the Court of Appeal which has made the decision or with the secretary of the competent collegium of the Supreme Court within thirty days from the moments indicated in paragraph 3 of article 63.

Article 73 Modalities of the Recourse

1. For the modalities of the act of recourse the provisions of article 65 are applicable.

Article 74 Introductory Activities to the Supreme Court Trial

1. When the act of recourse has been deposited with the secretary of the Court of Appeal, this shall immediately transmit to the Supreme Court the act of recourse deposited with him and a copy of the related annotations on the register.
2. In the same time he shall forward to the Supreme Court the file containing all documents produced in the previous procedural phases, the objects and documents seized.
3. When the act of recourse has been deposited with the secretary of the competent collegium of the Supreme Court this shall request the secretary of the Court of Appeal, which has made the contested decision to transmit the file containing all documents produced in the previous procedural phases, the objects and documents seized.
4. The competent collegium of the Supreme Court, upon reception of the above indicated material shall fix the date and the hour of the hearing for discussing the recourse and shall order the police to notify to the accused claimant and to the Saranwal his decision. Similar notification shall be made to the claimant Saranwal and to the adjudicated person when the recourse has been filed by the Saranwal.
5. The notification shall be served to the accused, the adjudicated person and the Saranwal at least five days before the date of the hearing.
6. The accused, the adjudicated person, defense counsels and the Saranwal have the right to consult the documents and to vision the seized material.

Article 75 Supreme Court Hearing

1. At the opening of the hearing a judge of the collegium of Supreme Court makes an oral exposition of the case indicating the points of the Court of Appeal's decision which are in question and the reasons of the complaint.
2. Then the party which has filed the recourse makes an oral presentation of the recourse with comments on the alleged errors or violation of the law.
3. Thirdly, the other party takes the floor presenting arguments in support of the appeal decision.
4. During the discussion the President and the members of the Court can address question in order to receive clarifications on given issues. At the end of the discussion the Court leaves the trial room and takes its decision in Chamber. Later on the Court enters the trial room and the President reads out the adopted verdict.
5. The Court can read out the reasons of the decisions in the same context, or otherwise, deposit them with the secretariat later on.

Article 76 Reject of the Recourse

1. The Supreme Court rejects the recourse and confirms the decision when:
 - a. It has not been lodged within the established term;
 - b. The complaint does not concern one of the issues indicated in article 71;
 - c. It results that the complaint is not grounded.

Article 77 Amendment of the Protested Decision

1. Wrong interpretations of the law or wrong references to law provisions contained in the reasons of the verdict of the Court of Appeal do not bring about the annulment of the protested decision if they have not had a decisive influence on the verdict. In this case, the Supreme Court makes the amendments on its own and informs the Court which made the protested decisions about the errors.
2. When in the protested decisions must be corrected only the kind or the amount of the punishment, because they were wrongly indicated or calculated, the correction is made directly by the Supreme Court.
3. The Supreme Court amends directly the protested decision when law provisions more favorable to the accused, even if supervened after the filing of the recourse, must be applied.

Article 78 Decision of the Supreme Court without Referral

1. The Supreme Court quashes the protested decision when:
 - a. The accusation does not constitute a crime, statute limitation has occurred or the prosecution was not permitted;
 - b. The decision concerns matters which are beyond the jurisdiction powers;
 - c. The sentence was adopted against a wrong person;

- d. Results that for the same person and the same facts a previous decision was already adopted;
- e. The same Supreme Court deems superfluous to refer the decision or can amend it on the basis of the already existing documentation.

Article 79 Referral to the Court of Appeal

1. In any other case different from those indicated in articles 76, 77 and 78 the Supreme Court quashes the decision and refers the case to a Court of Appeal different from the one which made the decision or to the same Court composed by different judges.
2. In its referral the Supreme Court gives directions to be followed in reviewing the case.
3. The decision of the Court of Appeal can be protested according to the provisions of article 71 and following.

Article 80 Scope of the Supreme Court Decision

1. The protested decision can be quashed in full or in part.

Chapter 11 Review of Court Sentences

Article 81 Cases of Revision

1. It is permitted, at all times, the revision, in favor of the person sentenced for misdemeanors or felonies, of the final decision in the following cases:
 - a. When the facts on which the sentence is based cannot be reconciled with the facts established in another final decision;
 - b. When a judgment drawn up by a civil Court upon which the sentence is grounded has been quashed;
 - c. When facts, circumstances or documents, demonstrating the innocence of the sentenced person, which were not known before the sentence, are newly disclosed or emerged;
 - d. When it turns out by means of judicial assessment that the sentence was based on false testimonies, forged documents or any other fact of criminal nature which have been assessed by a final judicial decision;
 - e. When after a sentence for murder new evidentiary elements supervene or emerge according to which results that the death of the person did not occur;
 - f. When the sentence was adopted at the end of a process conducted without informing the accused by regular notifications or not giving him the possibility to appear so to deprive him of the right of defense or when a real impediment for appearing was not known or disregarded by the Court.

Article 82 Right to Revision

1. The revision can be requested by the Saranwal, the sentenced person, or his or her defense counsel, or a close relative or heir.
2. In any instance, the request for revision must have the consent of the sentenced person unless the sentenced person is determined by the court to be incompetent, in which case the revision may be requested by the defense counsel or a close relative or heir without consent of the sentenced person.

Article 83 Revision Procedure

1. The petition for revision shall be forwarded to the Supreme Court together with the documents on which it is grounded.
2. Filing a revision petition does not stay the execution of the protested sentence except in the case of capital punishment.
3. The petition is evaluated by a Committee composed of a Supreme Court Justice and two appellate judges who are assigned by the Court's Presidents for consideration of the case.
4. The Attorney General shall express his opinion on the granting of the petition.
5. If the Committee finds that the petition is not convincingly grounded rejects the same, otherwise submits the petition to the Supreme Court delivering together with it the related file.

6. The decision of the Committee cannot be protested.
7. The Supreme Court upon reception of the petition and the related file shall fix a hearing ordering the notification of its decision to the requesting person and the attorney General that shall be served at least five days before the day of the hearing.
8. During the hearing the sentenced person or his defense counsel and the Saranwal express their views on the fundament of the petition.
9. In the event the Court approves the petition, it quashes the sentence and acquits the sentenced person if his innocence is obvious.
10. If the Court deems that the petition is not based on valid grounds, rejects the same.
11. When the Court finds that the case needs to be reassessed it shall dispatch the case to the Court that adopted the protested decision composed of different judges, or to another Court of the same level, giving it instructions for a proper review.
12. The review shall be conducted according to the rules applicable for normal hearings and the decision adopted replaces the previous one, remaining subject to protests which were allowed against the latter.
13. When as a consequence of the revision the sentenced person is acquitted the court, composed of different judges, shall order the restitution of the procedural expenses and any other cost paid as a result of the previous sentence. In case the concerned person is dead the restitution shall be made to his heirs.
14. Whenever a revision petition is rejected it is not allowed to file it again on the same grounds.

Chapter 12 Execution of Courts' Final Decisions

Article 84 Authority Responsible for Execution

1. The execution of final decisions is the responsibility of the Saranwal indicated in paragraph 4 of article 8.

Article 85 Execution of Prison Punishments

1. The Saranwal shall transmit to the Commander of the local police office the order to commit the sentenced person to prison when the latter is not already detained.
2. When the sentenced person is outside the jurisdiction of the local police office the police commander who has received the order shall forward it to the Commander of the police having jurisdiction on that place.
3. The same Saranwal can send the order directly to the said Commander.
4. If the sentenced person is already detained the Saranwal shall inform the Ministry of Justice about the sentence requesting its execution.
5. The above mentioned order and information shall contain personal particulars and whatever is needed to identify the person as well as the indications of the judicial decision and of the penalty imposed.

Article 86 Execution of Sanctions Alternative to Imprisonment

1. The Saranwal shall transmit to the Commander of the local police office the order for the execution of sanctions alternative to imprisonment.
2. The provisions of paragraphs 2, 3, and 4 of article 85 are applicable.
3. The police shall supervise the regularity of the execution and report to the Saranwal periodically about the behavior of the sentenced person.
4. If the sentenced person infringes the prescriptions contained in the execution order the Saranwal shall report the case to the competent Court which can replace the adopted sanction with a prison term of original duration.

Article 87 Execution of Fines

1. The Saranwal shall transmit to the Ministry of Justice the order for the execution of fines.
2. The Ministry of Justice, directly or requesting the collaboration of financial institutions, shall collect the indicated sums which will be delivered to the Ministry of Finance.

Article 88 Execution of Decisions for Confiscation of Objects and Assets

1. The Saranwal shall transmit to the Command of the police having jurisdiction on the place where the objects and assets to be confiscated are located the related

- order containing the indications needed for the identification of the said objects and assets.
2. The confiscation and the destination of the objects and assets are performed by the police.

Article 89 Special Provisions for the Execution

1. The time spent under arrest before the final decision shall be deducted from the prison or alternative sanction term to be executed.
2. When a prison sentence is to be executed towards a woman who is six months pregnant the Saranwal can stay the execution until four months after the delivering of the child.
3. When a prison sentence is to be executed towards a person who results to be mental insane the execution is stayed until his recovery. The Saranwal orders his transfer to a medical centre for the treatment of the mental illness. The time spent in intramural treatment shall be deducted from the prison term.
4. When a prison sentence is to be executed against a person affected by a serious physical illness, the Saranwal can stay the execution at the suggestion of a medical doctor who certifies that the imprisonment could be seriously prejudicial for the health of that person. The execution shall start as soon as the physical conditions of the concerned person permit the imprisonment. In this case no time is deducted from the prison term.
5. When a husband and his wife have been sentenced to prison for a term not exceeding one year, though for different charges, the Saranwal can stay the execution against one of them if he/she is not a recidivist and is supporting a child of less than fifteen years. The execution shall start when the child reaches the age of fifteen.

Chapter 13 Conditional Release

Article 90 Definition

1. Conditional release is the decision to put at liberty, under given conditions, a sentenced person before the expiration of his prison term, for a period equivalent to the duration of the same term.

Article 91 Conditions

1. Conditional release can be granted to a person serving a prison term as consequence of one of more crimes who, during the execution of the penalty, has behaved in such a way to demonstrate his social rehabilitation.
2. This benefit can be granted only if the person has served three quarters of the term and at least nine months of imprisonment.
3. In case of life sentence the benefit can be granted only after fifteen years of imprisonment.
4. The decision is adopted ex officio or following the proposal of the Director General of the Prisons, by the Court having jurisdiction on the place where the sentenced person is detained.
5. In its decision the Court shall indicate the behavioral prescriptions that the person must follow in the future.
6. The police shall report periodically to the Saranwal about the behavior of the person under conditional release.

Article 92 Revocation

1. Conditional release is revoked if before the expiration of the original term the person commits another crime or commits gross violations of the prescriptions.
2. In case of revocation half of the time spent under conditional release is subtracted from the prison term.
3. The revocation is decided by the same Court that has granted the benefit at the request of the Saranwal.

Article 93 Procedure

1. Both the decisions for granting conditional release and for its revocation are adopted by the Court after having heard the concerned person and the Saranwal in an informal hearing.
2. Before adopting the decision for granting the release the Court shall also hear the Director of the prison in which the sentenced person has served the previous prison time.

Chapter 14 Problems of Execution

Article 94 Competence and Procedure

1. The Court indicated in paragraph 4 of article 8 is competent to consider, at the request of the sentenced person or of the Saranwal, any problem raised in the course of the execution.
2. Whenever the Court finds the raised problem of no or scarce relevance it declares it inadmissible, otherwise, after having informally heard the complainer, the Saranwal and, in case of imprisonment execution, the Director of the prison adopts a decision giving instructions for redressing the situation.
3. The decision is notified to the person under execution, the Saranwal and the Director of the prison.
4. The decision can be appealed to the Provincial Court only in case of a gross violation of human rights in question.

Article 95 Disputes on Property

1. When a dispute arises on the belonging of objects or assets seized or confiscated and the case cannot be solved by the penal Court on the basis of existing documents and evidence, the dispute shall be handled by the civil Court or traditional justice entities.

Chapter 15 Miscellaneous Provisions

Article 96 Interim Defense Counsel

1. Up to when in the Country there will be not available a sufficient number of defense counsels, as established in article 18, the suspect or the accused can make recourse to the assistance of an educated person having some knowledge of legal issues.
2. To this end the President of each Court shall institute a list of persons having the qualities indicated in the previous paragraph following the indications for the Capital of the Ministry of Justice and for Districts and Provincial Courts of Government Cases Department.

Article 97 Districts with no Functioning or Established Courts

Whenever there is no district court established or functioning in a given district, the district court in the capital city of the Province will have territorial jurisdiction over all crimes committed within said district.

Article 98 Effective Date and Duration

1. This code shall become effective upon the execution of a Decree by the President of the Islamic Republic of Afghanistan published on the Official Gazette.
2. This code will remain in force until the enactment of rules of criminal procedure by the newly elected National Assembly, unless the National Assembly adopts this code with or without modifications.
3. Upon entry of the Presidential decree, any existing laws and decrees contrary to the provisions of this code are abrogated.

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Islamic Republic of Afghanistan

Counter Narcotics Drug Law

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English translation prepared from the Official Dari
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CONTENTS

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|--------------|---|
| Chapter I | General Provisions |
| Chapter II | Classification and Regulation of Drugs |
| Chapter III | Licensing Provisions |
| Chapter IV | Drug Trafficking Offenses and Penalties |
| Chapter V | Adjudication of drug-related offenses |
| Chapter VI | Search, Seizure, and Investigation Techniques |
| Chapter VII | Ministerial Duties and Responsibilities |
| Chapter VIII | Final Provisions |

CHAPTER I

General Provisions

Article 1: **Basis**

This Law is enacted pursuant to Article 7 of the Constitution of Afghanistan in order to prevent the cultivation of opium poppy, cannabis plants, and coca bush, and the trafficking of narcotic drugs, and to control psychotropic substances, chemical precursors, and equipment used in manufacturing, producing, or processing of narcotic drugs and psychotropic substances.

Article 2: **Objectives**

The objectives of this Law are:

1. To prevent the cultivation of opium poppy, cannabis plants, and coca bush, and prescribe penalties for persons engaging in these activities.
2. To regulate and control narcotic drugs, psychotropic substances, chemical precursors, and substances and equipment used in the manufacture, production, or processing of narcotic drugs and psychotropic substances in order to prevent their use for illicit purposes and to ensure their use for medical, scientific, research and industrial purposes in accordance with the provisions of the law.
3. To prescribe penalties for persons engaging in and to prevent the cultivation, production, processing, acquisition, possession, distribution, manufacture, trade, brokering, importation, exportation, transportation, offering, use, storage, and concealment of narcotic drugs and psychotropic substances, and of the chemical precursors, other illicit substances, and equipment used for these illicit activities.
4. To coordinate, monitor, and evaluate the counter narcotics activities, policies, and programs of the Government of the Islamic Republic of Afghanistan.
5. To encourage farmers to cultivate licit crops instead of opium poppy, coca bush, and cannabis plants.
6. To establish health centers for detoxification, treatment, rehabilitation, and harm reduction services for drug-addicted and drug dependent persons in order to reintegrate them into society.
7. To attract the cooperation and assistance of national and international organizations in the task of combating cultivation, trafficking and use of narcotic drugs, psychotropic substances, and the chemical precursors used in their production, manufacturing, and processing.

ARTICLE 3:
Definitions

Terms: The following terms have the following meanings in this law:

- 1) "Narcotic Drug" means a plant, substance or preparation classified as such in the Tables annexed to this law.
- 2) "Analogue" means any substance which is not included in any of the Tables annexed to this law but whose chemical structure combination and whose psychotropic effects are similar to those of a substance included in the Tables annexed to this law
- 3) "Controlled delivery" means allowing the transportation and passage of illicit or suspected consignments of prohibited articles, including drugs, precursors, analogues or substances substituted for them, equipment of clandestine laboratories, or laundered money into or through Afghanistan or one or more countries, with the knowledge and under the supervision of the competent law enforcement authorities, in efforts to identify persons and investigate and establish proof of criminal offenses.
- 4) "Dependence" is a condition in which the use of drugs is compulsive, and stopping gives rise to psychological and even physical disorders, which leads the person to continue using the drug.
- 5) "Detoxification treatment" means treatment intended to eliminate physical dependence on a drug.
- 6) "Drug abuse" and "illicit drug use" mean the use of any regulated drug without a medical prescription and medical instructions for non-scientific and non-medical purposes.
- 7) "Drug addict" means a person in a state of physical and/or psychic dependence on a drug.
- 8) "Industrial use" of a drug means its exclusive use in a manufacturing process.
- 9) "Medical prescription" means a written document signed by a physician or a person holding a medical license, issued for the medical treatment of a patient and authorizing the dispensing by a pharmacist to that person of a specific quantity of controlled drugs.
- 10) "Medical use" means the consumption or use of drugs controlled by this law under a medical prescription and in accordance with international conventions.
- 11) "Money-laundering" means the same concepts as defined under article 3 of the Law against Money-Laundering and Criminal Proceeds published in the Official Gazette No. 840 on 10.08.1383.

12) "Precursor" means a substance used in drug manufacture or processing and classified as such under Table IV of this law.

13) "Psychotropic substance" means a drug in one of the Tables annexed to the 1971 Convention on Psychotropic Substances.

14) "Regulated drugs" are defined as all plants and substances, including their chemical preparations and their derivatives, and chemical precursors that are listed in Tables 1 - 4, derived from the United Nations International Conventions on Drugs, attached to this law.

15) "Mixture" or "Compound" means any preparation that contains any detectable amount of a controlled or regulated drug substance under this law.

16) "Covert Operations" means the investigation of criminal offences by law enforcement agencies' use of methods that include surveillance, the use of informants, undercover operations and the exchange of intelligence with appropriate law enforcement agencies or other organisations.

17) "Vehicle" means any mode of transportation used in drug-trafficking].

18) "Undercover Operations" means operations carried out in secret by the police in which the officers' identities are concealed from third parties by the use of an alias and false identity so as to enable the infiltration of existing criminal groups in order to arrest suspected criminals.

19) "Surveillance" means the covert watching of a person or group of persons or the covert listening to their conversations over a period of time by a human being or through the use of technical devices.

20) "Secret or Electronic Surveillance" means surveillance authorized by a competent court in accordance with the provisions of law. This surveillance includes the following activities:

- watching in private places using human or technical means;
- interception of communications;
- opening of mail; and,
- inspection of bank accounts and records of other financial activity.

21) "Conspiracy" or "Complicity" means the same as defined under article 49 of the 1355 Penal Code published in the Official Gazette No. 347.

22) "Possession" means the ability to exert control over an object, including cases where a person is not in physical contact with the object, but has the power to exercise control over it, either directly or through others.

23) "Distribution" is the transfer or attempted transfer of possession from one person to another.

24) "Aid" or "abet" means the same as defined under article 39 of the 1355 Penal Code published in the Official Gazette No. 347.

25) "Attempt" means the same as defined under article 29 of the 1355 Penal Code published in the Official Gazette No. 347.

26) "Public official" shall mean any officer, employee, or person acting for, on behalf, or under the authority of a government agency.

27) "Official act" shall mean any decision or action on any matter, controversy, or legal proceeding by a public official.

28) "Bribe" shall mean corruptly giving, offering, or promising anything of value to any person or entity, directly or indirectly, with the purpose of:

- (1) influencing an official act;
- (2) influencing a public official to commit or omit any act in violation of his lawful duty; or
- (3) influencing witnesses, detection, investigation, or trial proceedings;
- (4) compelling any witness to be absent from any legal or court proceedings;
- (5) influencing any agency, commission, or officer authorized by the law to hear and record the testimony of witnesses.

29) "Weapon" means any beating or injuring tools and devices, firearms, and explosives capable of inflicting injury or destruction, or that can cause death.

CHAPTER II
**Classification and regulation of narcotic drugs, psychotropic substances, and
chemicals used in the manufacture, production, or processing of narcotic drugs and
psychotropic substances**

Article 4:
Classification and Regulation of Narcotic Drugs

1. For purposes of this law, regulated drugs are defined as all plants and substances that are listed in Tables 1-3, including their chemical derivatives, and all chemical precursors that are listed in Table 4 of the Tables attached hereto. The regulated drugs covered by this law shall be classified in four tables:
 - Table 1: Prohibited plants and substances with no medical use;
 - Table 2: Strictly controlled plants and substances with a medical use;
 - Table 3: Controlled plants and substances with a medical use;
 - Table 4: Chemical precursors and other substances used in the illicit manufacture or processing of narcotic drugs and psychotropic substances.

Article 5:
Drug Regulation Committee

- 1) A Drug Regulation Committee is hereby established which shall be composed of five members with the following composition:
 - a) One medical and one pharmaceutical expert from the Ministry of Public Health;
 - b) Two experts from the Ministry of Counter-Narcotics;
 - c) One customs expert from the Ministry of Finance.
- 2) Members of the Drug Regulation Committee mentioned in paragraph 1 of this Article shall be appointed by their respective ministries for a period of four years. The Chairperson of the Drug Regulation Committee shall be appointed by the Minister of Counter-Narcotics from among its members.
- 3) Decisions and regulations of the Drug Regulation Committee shall be made by a majority of its members and shall be recorded in a special book.
- 4) In case any member of the Drug Regulation Committee fails to carry out his/her duties in a satisfactory fashion, he/she can be removed from his membership in the Committee by the Minister of Counter Narcotics.
- 5) The administrative costs of the Drug Regulation Committee and those of its secretariat shall be paid directly from the budget of the Ministry of Counter Narcotics. Members of the Drug Regulation Committee shall be paid appropriate attendance fees by the Ministry of Counter-Narcotics.

6) The Drug Regulation Committee shall prepare one quarterly and one annual report to the Minister of Counter Narcotics on its activities. The Minister may direct the Drug Regulation Committee to provide the necessary information in accordance with this Law and relevant regulations.

7) The Drug Regulation Committee will hereinafter be called the Committee.

Article 6:
Duties of the Committee

1. The classifications of the regulated drugs in Tables 1 through 4 shall be established and amended, in particular by new inclusions, deletions, or transfers from one Table to another, by the Committee, taking into account any amendments or additions ordered by the United Nations Commission on Narcotic Drugs. Plants and substances shall be included under their international non-proprietary name or, failing this, under their commercial, scientific, or common name.
2. The Committee may not include an internationally controlled substance in a Table subject to a regime less strict than that required under the United Nations Conventions for the substance in question.
3. The Committee shall not transfer any substance from Table 1 to Table 2 or 3, except as provided in paragraph 1 of this Article.
4. Inclusions, deletions or transfers from one Table to another in accordance with paragraphs 1, 2, and 3 above shall be valid when they are published in the official gazette.
5. Except as otherwise provided by this law, a preparation, compound, or mixture of any regulated drug shall be subject to the same regulations, prohibitions, and penalties as the regulated drug which it contains, and if it contains two or more regulated drugs it shall be subject to the conditions governing the most strictly controlled regulated drug that it contains.
6. A preparation, compound, or mixture containing a substance listed in Tables 2, 3 or 4 that is compounded in such a way as to present no, or a negligible, risk of abuse or diversion and from which the substance cannot be recovered by readily applicable means in a quantity liable to illicit use, abuse, or diversion may be exempt from certain of the control measures set forth in this law by decision of the Committee.
7. If the substances listed in Tables 2 and 3 and their preparations can be used in medicine they shall be subject to the provisions applicable to all substances and preparations intended for use in human or veterinary medicine to the extent that such provisions are compatible with those established in this law.

CHAPTER III
Licensing, Cultivation, Production, Manufacture, Trade, Distribution, and Use of
Plants, Substances and Preparations Listed in Tables 1, 2, 3, and 4

Article 7:
Licenses

1. No person shall cultivate, produce, process, manufacture, trade, distribute, possess, supply, traffic, transport, transfer, acquire, purchase, sell, import, export, or transit, plants, substances and preparations listed in Tables 2 and 3 in the territory of Afghanistan, unless he has been licensed by the Committee.
2. No person may engage in any of the operations set forth in paragraph 1 of this article at any building or on any premises not expressly identified on a license issued under this Article, or separately licensed by the Committee for use by specially designated State enterprises, or exempt from licensing under this law.
3. The Committee may issue a license to cultivate, manufacture, distribute (including dispensing), import or export one or more of the plants, substances and preparations listed in Tables 1, 2 and 3 at the building or on the premises identified in the license. Such a license shall permit any of the operations set forth in the first paragraph of this article that are necessarily involved in the licensed activity.
4. A license to engage in the operations set forth in paragraph 1 of this article may be issued only if the use of the plants, substances and preparations in question is restricted to medical or scientific purposes. This license shall be valid for one year. Licensing shall be subject to verification of the character and professional qualifications of the applicant. A license may not be granted to any person convicted of a narcotics or money laundering offense.
5. The industrial production and use of a substance listed in Tables 1, 2 or 3 for other than medical or scientific purposes may be authorized by the Committee if the applicant satisfactorily shows that such production or use is necessary to a industrial process, he shall ensure that the products manufactured, other than another regulated drug subject to this Law, cannot be abused or produce harmful effects, and he shall ensure that any regulated drug included in this authorization and used in the composition of the products manufactured cannot be easily recovered. The person or entity so authorized shall destroy all quantities of the regulated drug included in this authorization that cannot be rendered harmless or sufficiently irretrievable and reports to the Committee the quantity of the regulated drug produced, used or destroyed.

6. A person can operate in places set forth in paragraphs 3 and 7 of this article which have been designated for the manufacture, distribution (including dispensing), importation or exportation of regulated drugs only when those places comply with the security standards established by the Committee.
7. State enterprises specially designated by the Committee to engage in the operations set forth in paragraph 1 of this article shall be required to apply for a license to use buildings and premises for such operations, and the Committee may issue such license in accordance with the requirements of paragraph 6 of this Article.
8. For the better implementation of this article, the Committee may establish regulations, in particular those governing applications for and the granting, content, scope, withdrawal and suspension of licenses.

Article 8:
Possessing Needed Amounts of Narcotic Drugs

1. Authorized regulated drug manufacturers and distributors may hold the quantities of the various regulated drugs required for the smooth functioning of business. The distributors who only dispense regulated drugs are excepted from this provision.
2. The Committee shall establish for each year, taking into account the prevailing market conditions, the anticipated medical, scientific, research, and industrial needs for the regulated drugs in Tables 1, 2 and 3, and the anticipated lawful exports of such regulated drugs, the maximum quantities of these regulated drugs that shall be manufactured and the maximum quantities that each licensee and each specially designated State enterprise shall be entitled to manufacture. These limits may be changed during the year if necessary.
3. The Committee may establish and publish regulations and procedures for the implementation of this Article.

Article 9:
Exports and imports

1. The export and import of substances on Tables 1, 2 and 3 shall be subject to separate authorization issued by the Committee.
2. This authorization shall be subject to the completion of a form which includes the requirements established by the Committee and the United Nations Economic and Social Council.

3. The Committee may authorize an importation of a substance listed in Tables 1, 2, or 3 only to meet legitimate medical, scientific, and industrial needs. The import authorization shall not be necessary in the event of a catastrophe or an emergency as determined by the Committee, but the importer shall maintain a record of the importation as prescribed by the Committee.
4. The Committee may authorize an exportation of a substance listed on Tables 1, 2, or 3 only to a country that maintains effective controls over the use of the regulated drug and only if the regulated drug is to be used for medical, scientific, or other legitimate purposes.
5. An authorization for the importation or exportation of a substance listed on Tables 1, 2, or 3 is not transferable.
6. An application for import or export authorization of a substance listed on Tables 1, 2, or 3 shall indicate the following:
 - a) The name and address of the importer or exporter;
 - b) The names and addresses of any consignee, if known;
 - c) The international non-proprietary name of each substance or, failing this, the name of the substance in the tables of the international conventions;
 - d) The pharmaceutical form and characteristics of each substance and, in the case of a preparation, its trade name;
 - e) The quantity of each substance and preparation involved in the operation;
 - f) The period during which the operation is to take place;
 - g) The mode of transport or shipment; and
 - h) The border custom house of the importation and exportation.
7. An import certificate or other documentation issued by the Government of the importing country shall be attached to the export application.
8. An import or export authorization shall contain, in addition to the expiration date and the name of the issuing authority, the same types of details as the application.
9. The import authorization shall specify whether the import is to be effected in a single consignment or may be effected in more than one consignment, and shall establish the time in which the import of all consignments must be effected.
10. The export authorization shall also indicate the number and date of the import certificate issued by the Government of the importing country;
11. A copy of the export authorization shall accompany each consignment and the Committee shall send a copy to the Government of the importing country.
12. If the quantity of plants, substances or preparations actually exported is smaller than that specified in the export authorization, and is certified by the customs

office, the Committee shall note that fact on the related document and on all official copies thereof.

13. Once the consignment has entered the national territory or when the period stipulated in the import authorization has expired, the Committee shall send the export authorization to the Government of the exporting country, with an endorsement specifying the quantity of each regulated drug actually imported.
14. Commercial documents such as invoices, cargo manifests, customs or transport documents and other shipping documents shall include the name of the plants and substances as set out in the tables of the international conventions and the trade name of the preparations, the quantities exported from the national territory or to be imported into it, and the names and addresses of the exporter, the importer and the consignee.
15. Exports from the national territory of consignments to the address or account of a person other than the person named in the import certificate issued by the Government of the importing country or in other documentation demonstrating authorization for the import into that country shall be prohibited. This same provision shall apply to the importation of consignments into the national territory.
16. Exports from the national territory of consignments to a bonded warehouse shall be prohibited unless the Government of the importing country certifies on the import certificate or other authorization that it has approved such a consignment.
17. Imports to the national territory of consignments to a bonded warehouse shall be prohibited unless the Government certifies on the import certificate that it approves such a consignment. Withdrawal from the bonded warehouse shall require a permit from the authorities having jurisdiction over the warehouse. In the case of a consignment to a foreign destination, such withdrawal shall be treated as if it were a new export within the meaning of the present Article. The regulated drugs stored in the bonded warehouse may not be subjected to any process, which would modify their nature, nor may their packaging be altered without the permission of the authorities having jurisdiction over the warehouse.
18. A consignment entering or leaving the national territory which is not accompanied by a proper import or export authorization or does not comply with the authorization shall be detained by the competent authorities until the legitimacy of the consignment is established or until a court rules on its status.
19. The Committee shall specify those customs offices operating in the national territory that are to deal with the import or export of the regulated drugs listed in Tables 1, 2 and 3.

20. The transit of any consignment of plants, substances or preparations listed in Tables 1, 2 and 3 through the national territory shall be prohibited, whether or not the consignment is removed from the conveyance in which it is carried, unless a copy of the export authorization issued by the Government of the exporting country for such consignment is produced to the department designated by the Committee
21. The route specified by the export license for a consignment which is in transit in Afghanistan shall not be changed.
22. An application for authorization to change the itinerary or the consignee shall be treated as if the export in question were from the national territory to the new country or consignee concerned.
23. No consignment of plants, substances and preparations in transit through the national territory may be subjected to any process that might change their nature, nor may its packaging be altered without the permission of the Committee.
24. If there is a conflict between the provisions of this article and those of an international agreement that Afghanistan has signed, the provisions of the international agreement prevail.
25. The provisions of this article shall not apply where the consignment in question is transported by air to another country. If the aircraft stops over or makes an emergency landing in the national territory, the consignment shall be treated as an export from the national territory to the country of destination only if it is removed from the aircraft.
26. Free ports and free trade zones shall be subject to the same controls and supervision as other parts of the national territory regarding the importation of plants, substances, or preparations listed in Tables 1, 2 and 3.
27. Transport companies and enterprises shall abide by the regulations of the Committee with regard to taking reasonable measures to prevent the use of their means of transport for illicit trafficking in the regulated drugs covered by the present law, and shall also be required:
 - To submit cargo manifests in advance, whenever possible;
 - To keep the products in sealed containers having tamper-resistant, individually verifiable seals, and in which every kind of alteration should be easily discernable;
 - To report to the appropriate authorities, at the earliest opportunity, any suspicious consignments.

Article 10:
Retail Trade and Distribution

1. Purchases of regulated drugs listed in Tables 2 and 3 for the purpose of professional supply may be made only from a private individual or state enterprise holding a license issued under this law.
2. Only the following persons and state entities may, without having to apply for a license, purchase and hold plants and regulated drugs listed in Tables 2 and 3 for their professional needs:
 - Pharmacists holding a license to practice when acting in the usual course of business as an agent or employee of a person or entity holding a valid license to distribute regulated drugs;
 - Pharmacists at a public or private hospital or health care institutions that is licensed to distribute regulated drugs when acting in the usual course of business as an agent or employee of that hospital or health care institutions;
 - Pharmacists holding a license to practice in charge of public or private warehouses;
 - Hospitals or health care institutions without a pharmacist in charge, in emergency cases and unanticipated events provided that a qualified physician attached to the establishment who holds a license to practice and to dispense regulated drugs has agreed to take responsibility for the stocks in question;
 - Physicians, dental surgeons, and veterinary surgeons holding a license to practice and authorized to dispense regulated drugs, including the preparations included in a list drawn up by the Committee;
3. Physicians, dental surgeons, and veterinary surgeons holding a license to practice may, without having to apply for a drug distribution license, purchase and hold the needed quantities of preparations included in a list drawn up by the Committee.
4. Dental surgeons, midwives, and nurses holding a license to practice may, without having to apply for a license, purchase and hold for their professional activities quantities of preparations included in a list drawn up by the Committee.
5. The regulated drugs listed in Tables 2 and 3 may be prescribed to individuals and animals only in the form of pharmaceutical preparations and only on a medical prescription issued by one of the following professionals:

- A physician holding a license to practice and to dispense regulated drugs;
 - A dental surgeon holding a license to practice and to dispense regulated drugs, for treatment of a dental nature;
 - A veterinary surgeon holding a license to practice and to dispense regulated drugs, for treatment of animals;
 - A nurse or midwife holding a license to practice for treatment connected with their professional duties and within the limits set by the competent authority.
6. Pharmaceutical preparations listed in Tables 2 and 3 may be dispensed only by:
- Dispensing pharmacists holding a license;
 - Pharmacists at public or private hospitals or health care institutions when such hospitals or institutions hold a license to dispense regulated drugs;
 - Physicians and veterinary surgeons holding a license to practice and authorized to dispense regulated drugs;
 - Nurses and midwives in the conduct of their professional duties.
7. The Committee, if the situation so requires and under such conditions as it may determine, may authorize, in all or part of the national territory, licensed pharmacists or any other licensed retail distributors to supply, without prescription, small quantities of therapeutic doses of pharmaceutical preparations containing one or more of the regulated drugs listed in Table 3.
8. The Committee shall establish regulations for the implementation of this Article, in particular the rules concerning the writing and filling of prescriptions for pharmaceutical preparations listed in Tables 2 and 3.

Article 11:

Private institutions and state enterprises

1. Private institutions and State enterprises holding licenses to engage in operations involving regulated drugs shall furnish to the Committee in respect of their activities:
- Not later than 15 days after the end of each quarter, a quarterly report on the quantities of each substance and each preparation imported or exported, indicating the country of origin and the country of destination;

- Not later than 5 May of each year, a report for the previous calendar year indicating:
 - The quantities of each substance and each preparation produced or manufactured;
 - The quantities of each substance used for producing preparations and other:
 - Other substances covered by the present legislation; and
 - Substances not covered by the present legislation;
 - The quantities of each substance and each preparation supplied for retail distribution, medical or scientific research or teaching;
 - The quantities of each substance and each preparation in stock as of 29 March of the year to which the information refers;
 - The quantities of each substance necessary for the new calendar year.
- 2. The Committee shall establish procedures for the purchase of and placing orders for plants, substances and preparations listed in Tables 2, 3, and 4 required for the conduct of professional activities.
- 3. The Committee shall establish procedures for any purchase, transfer, export, import or dispensing of plants, substances and preparations listed in Table 2, and all related transactions shall be recorded in accordance with regulations established by the Committee.
- 4. Any person, private enterprise, or state enterprise holding, for professional purposes, any plants, substances and preparations listed in Tables 2, 3, and 4 shall be required to keep them under regulations established by the Committee so as to prevent theft or any other form of diversion.
- 5. Any person, private enterprise, State enterprise, medical or scientific institution engaged in any activity or operation involving plants, substances or preparations covered by the present law shall be controlled and monitored by regulations established by the Committee. Such control and monitoring shall extend to the compartments containing first-aid kits of public transport conveyances engaged in international travel. The Committee shall, in particular, arrange for inspectors or any other body legally empowered to conduct inspections to make ordinary inspections of the establishments, premises, stocks and records at least once every two years. Extraordinary inspections can be done at any time.

Article 12:
Monitoring and Control

1. State enterprises, private enterprises, medical and scientific institutions and other persons referred to in Article 11 shall be required, at the beginning of each year, to make an inventory of the plants, substances and preparations listed in Tables 1, 2 and 3 held by them and to compare the total quantities in stock at the time of the previous inventory, calculated together with those entered over the previous year and the total quantities withdrawn during the year, with those held at the time of the latest inventory.
2. Licensees, pharmacists and persons authorized to dispense drugs through wholesale pharmacies or drugstores shall be required to make an inventory and calculate the balance as stipulated in paragraph 1 of this article.
3. Any discrepancies noted in a balance or between the results of the balance and those of the inventory shall be immediately reported by the licensee, pharmacist or person authorized to dispense drugs to the Committee, which shall acknowledge receipt of the notification.
4. It shall be forbidden to distribute substances and preparations listed in Tables 2 and 3 unless they are enclosed in wrappers or containers bearing their name and, in the case of consignments of substances and preparations listed in Table 2, a double red band.
5. The outer wrappings of parcels described in paragraph 4 shall bear no information other than the names and addresses of the sender and the consignee. They shall be sealed with the sender's mark.
6. The label under which a preparation is offered for sale shall indicate the names of the substances listed in Tables 1, 2 and 3 that it contains, together with their weight and percentage.
7. Labels accompanying packages for retail sale or distribution as described in paragraph 4 shall indicate the directions for use as well as the cautions and warnings necessary for the safety of the user.
8. If necessary, additional requirements in respect of packaging and labeling shall be stipulated by regulations established by the Committee.

Article 13:
Regulation of Substances (Precursors) In Table 4

1. The manufacture, distribution or trading of the substances listed in Table 4 shall be subject to the provisions of this article.

2. Import or export authorizations shall be refused if a consignment is possibly [?!?!] intended for the illicit manufacture of narcotic drugs or psychotropic substances.
3. Export or import consignments of substances listed in Table 4 annexed to this law shall be clearly labeled to show their contents.
4. Any person who, because of his job requirements, becomes aware of the economic, industrial, trade or professional secrets or trade processes of the substances listed on Table 4 annexed to this law shall be required to avoid disclosing the same to other people.
5. Manufacturers, importers, exporters, wholesalers and retailers shall be required to enter in a register established by the Committee any purchase or transfer of substances listed in Table 4. The entry shall be made with no blank spaces, erasures or overwriting. It shall indicate the date of the transaction, the name and the quantity of the product purchased or transferred and the name, address and occupation of the purchaser and seller. However, retailers shall not be required to enter the name of the purchaser. The registers shall be kept for ten years pursuant to regulations established by the Committee.
6. Manufacturers, importers, exporters, wholesalers and retailers of the substances listed in Table 4 shall be required to inform the appropriate police authority of any orders or transactions that appear suspicious, in particular by reason of the quantity of the substances being purchased or ordered, the repetition of such orders or purchases or the means of payment or transport used.
7. If there is strong evidence to warrant the suspicion that a substance listed in Table 4 is for use in the illicit manufacture of a narcotic drug, such substance shall be immediately seized pending the outcome of a judicial investigation.
8. The Committee shall submit to the Minister of Counter-Narcotics information on the import and export of precursor substances listed in Table 4.

Article 14:
Medical and Scientific Research and Teaching

1. For purposes of medical or scientific research, teaching or forensic work, the Committee may authorize, in accordance with a separate procedure and without requiring the licenses referred to in this Chapter, the cultivation, manufacturing, acquiring, importation, use, or possession of plants, substances and preparations in Tables 1, 2 and 3 in quantities not exceeding those strictly necessary for the purpose in question.
2. The applicant of the authorization referred to in paragraph 1 of this article shall enter in a register, which he shall keep for 5 years, the quantities of plants,

substances and preparations that he imports, acquires, manufactures, uses, and destroys. He shall also record the dates of the operations and the names of his suppliers. He shall furnish the Committee with an annual report on the quantities used or destroyed and those held in stock. The Committee shall be entitled to inspect registers maintained in accordance with this provision.

Chapter IV
Offenses and Penalties

Article 15:
Drug Trafficking Offenses and Penalties

1. Any person who engages in the following acts without a license or authorization issued according to the provisions of this law has committed a drug trafficking offense and shall be punished in accordance with the provisions of this law:
 - (a) The production, manufacture, distribution, possession, extraction, preparation, processing, offering for sale, purchasing, selling, delivery, brokerage, dispatch, transportation, importation, exportation, purchase, concealment, or storage of any substance or mixture containing a substance listed in Tables 1 through 3 annexed to this law;
 - (b) Any of the operations referred to in paragraph 1 of this article in relation to any chemicals or precursors listed in Table 4 for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances.

Article 16:
Drug Trafficking Penalties

1. Whoever commits a drug trafficking offense involving the following quantities of heroin, morphine, or cocaine, or any mixture containing those substances, shall be sentenced as follows:
 - (i) Less than 10 grams, imprisonment for between 6 months and one year, and a fine of between 30,000 Afs and 50,000 Afs.
 - (ii) Between 10 grams and 100 grams, imprisonment for between one and three years, and a fine of between 50,000 and 100,000 Afs.
 - (iii) Between 100 grams and 500 grams, imprisonment for between three and five years, and a fine of between 100,000 Afs and 250,000 Afs.
 - (iv) Between 500g and 1kg, imprisonment for between seven and ten years, and a fine of between 300,000 Afs and 500,000 Afs.
 - (v) Between 1kg and 5kg, imprisonment for between ten and fifteen years, and a fine of between 500,000 Afs and 1,000,000Afs.
 - (vi) Over 5kg, life imprisonment, and a fine of between 1,000,000 Afs and 10,000,000Afs.

2. Whoever commits a drug trafficking offense involving the following quantities of opium or any mixture containing that substance shall be sentenced as follows:
- (i) Less than 10 grams, imprisonment for up to three months, and a fine of between 5000 Afs and 10,000 Afs.
 - (ii) Between 10 grams and 100g, imprisonment between six months and one year, and a fine of between 10,000 Afs and 50,000 Afs.
 - (iii) Between 100g and 500g, imprisonment for between one and three years, and a fine of between 50,000 and 100,000 Afs.
 - (iv) Between 500g and 1kg, imprisonment for between three and five years, and a fine of between 100,000 Afs and 500,000 Afs.
 - (v) Between 1kg and 5kg, imprisonment for between five and ten years, and a fine of between 500,000 Afs and 1,000,000 Afs.
 - (vi) Between 5kg and 50kg, imprisonment for between ten and fifteen years, and a fine of between 700,000 Afs and 1,500,000 Afs.
 - (vii) Over 50kg, life imprisonment and a fine of between 1,500,000 Afs and 5,000,000 Afs.
3. Whoever commits a drug trafficking offense involving the following quantities of the substances or any mixture containing substances listed in Tables 1 through 4, with the exception of heroin, morphine, cocaine, and opium, shall be sentenced as follows:
- (i) Less than 250 grams, imprisonment for up to three months, and a fine of between 5000 Afs and 10,000 Afs.
 - (ii) Between 250 grams and 500g, imprisonment for between three months and six months and a fine of between 10,000 Afs and 50,000 Afs.
 - (iii) Between 500g and 1 kg, imprisonment for between six months and 1 year, and a fine of between 50,000 Afs and 100,000 Afs.
 - (iv) Between 1kg and 5kg, imprisonment for between one and three years, and a fine of between 100,000 Afs and 500,000 Afs.
 - (v) Between 5kg and 10kg, imprisonment for between five and ten years and a fine of between 500,000 Afs and up to 1,000,000 Afs.
 - (vi) Over 10kg, imprisonment for between ten and fifteen years, and a fine of between 1,000,000 Afs and 1,500,000 Afs.

4. Any person who, during the course of any of the offenses set forth in paragraphs 1, 2, and 3 of this article, directs, controls, organizes, finances, or guides three or more persons, shall be sentenced to penalties thrice as severe as the maximum penalties prescribed for that crime under the sub-paragraphs of paragraphs 1, 2, and 3 of this article, provided that the term of imprisonment does not exceed 20 years.

Article 17:

Aggregation of Amounts

1. If several persons are responsible for the commission of a drug trafficking offense, and the amounts of drugs trafficked by each of them is known, each of the offenders shall be punished under the provisions of this law pursuant to his share in the overall amount trafficked.
2. If several persons are responsible for the commission of a drug trafficking offense, but the share of each in the amount of drug trafficked is not known, each of them shall be sentenced to a penalty prescribed for the total amount trafficked.

Article 18:

Conspiracy, Aiding, Abetting, Facilitation, Incitement

Any person who attempts, conspires, or engages in preparatory acts to commit any offense under this law shall be subject to the same penalties as the principal offender.

Article 19:

Drug laboratories, manufacturing, and storage

Whoever without authorization under this law opens, maintains, manages, or controls any property, building, room, or facility, as an owner, lessee, manager, agent, employee, or mortgagee, and intentionally rents, leases, or makes available for use, with or without compensation, such a place for the purpose of cultivating, manufacturing, processing, storing, concealing, or distributing any substance or mixture listed in Tables 1 through 4, or participates in or obtains an income from such activity, shall be sentenced to a term of imprisonment between 10 and 20 years and a fine of between 500,000Af. and 1,000,000 Afs.

Article 20:

Importation or use of equipment for drug trafficking

1. Whoever imports equipment or materials used in or for the production and processing of regulated drugs without having a license, shall be sentenced to imprisonment for 5 to 10 years and a fine of between 100,000 and 500,000 Afs, and shall have the equipment or materials confiscated.

2. Whoever lawfully imports equipment or materials used in or for the production and processing of drugs but uses them in the illicit production or processing of the regulated drugs, shall be sentenced to imprisonment for 10 to 15 years and a fine of between 500,000 and 1,000,000 Afs, and shall have the equipment or materials confiscated.
3. Whoever possesses or uses the equipment or materials referred to in paragraph 1 of this article for the illicit production or processing of regulated drugs, shall be sentenced to imprisonment for 15 to 20 years and a fine of between 1,000,000 and 2,000,000 Afs, and shall have the equipment and materials confiscated.

Article 21:

Drug-related corruption and intimidation

1. Any public official who intentionally commits one of the following acts shall be sentenced to imprisonment for 5 to 10 years and shall be fined twice the amount of the bribe:
 - (a) facilitating or assisting any offense under this law;
 - (b) obstructing an official investigation of an offense under this law or obstructing a trial of any offense under this law, including by failing to carry out lawful obligations; or
 - (c) directly or indirectly demanding, seeking, receiving, accepting, or agreeing to accept or receive a bribe in relation to drug trafficking or any official duty connected directly or indirectly to drug law enforcement,

A bribe-giver and a bribe-agent shall be sentenced to the same penalties as the bribe-taker.
2. Any person who threatens or intimidates another for the purpose of committing the following acts shall be sentenced to imprisonment between 5 and 8 years and fined between 500,000 and 1,000,000 Afs.
 - (a) committing or facilitating an offense under this law; or
 - (b) impeding a drug trafficking investigation or prosecution,
3. Any person who receives or accepts any benefit for the purpose of impeding or interfering with an investigation or criminal trial of a drug trafficking offense shall be sentenced to imprisonment for between 5 and 10 years, and shall relinquish the benefit.
4. Any person who threatens or seeks to intimidate any public official in connection with the detection of any drug trafficking offense, or an investigation or criminal

- trial of any drug trafficking offense, shall be sentenced to imprisonment for between 5 and 10 years, and a fine of between 1,000,000Afs and 2,000,000 Afs.
5. Any person who injures any public official in connection with the detection, investigation or criminal trial of any drug trafficking offense, shall be sentenced to imprisonment between 10 to 15 years, and a fine of between 1,000,000Afs and 3,000,000 Afs.
 6. Subject to the provisions of Chapter Seven of the Penal Code, the penalties set forth in paragraphs 1, 2, 3, 4, and 5 of this article shall be in addition to other penalties that an offender may be sentenced to for committing other criminal offenses.

Article 22:
Use of Weapons

1. Any person who uses, or causes the use of, any weapon during or in relation to any drug trafficking offense shall be punished by a term of five to ten years imprisonment, and a fine between 500,000 Afs and 1000,000 Afs.
2. Any person who carries or possesses any weapon, or causes another person to carry or possess any weapon, during or in relation to any drug trafficking offense shall be punished by a term of 3 to 5 years imprisonment, and a fine of between 500,000 Afs and 1,000,000 Afs.

Article 23:
Intimidation Leading to Drug-related Offenses

Any person who intentionally commits the following acts shall be sentenced to a term of imprisonment of between 5 and 8 years, and a fine of between 50,000 Afs and 200,000 Afs.

- (a) Compelling another by force or intimidation to cultivate, manufacture, distribute, possess, sell, transport, store, or use substances or any mixture containing substances on Tables 1 through 4;
- (b) Mixing substances on Tables 1 through 4 in food or drink intending that they be consumed by others;
- (c) Distributing or sells any substance or mixture containing substances on Tables 1 through 4 to a child or to a person with mental health problems;
- (d) Distributing any substance or mixture containing substances on Tables 1 through 4 in educational, military training, health or social service centers, or prisons;

- (e) Employing or using a child to commit a drug trafficking offense; or
- (f) Allowing the consumption of substances or any mixture containing substances on Tables 1 through 4 in restaurants, hotels, shops or any other premises.

Article 24:
Illicit Prescription of Drugs

Any person who intentionally commits the following acts shall be sentenced to a term of imprisonment of between 3 and 5 years, and a fine of between 50,000 Afs and 100,000 Afs.

- (a) Prescribing a regulated drug knowing it is to be used illegally; or
- (b) Selling and buying regulated drugs using fraudulent prescriptions,

Article 25
Prohibition on Cultivation

1. Planting or cultivating opium poppy and seeds, coca bush, and cannabis plants within Afghanistan is a criminal offense and prohibited.
2. The owners, occupiers, or cultivators of lands are obligated to destroy opium poppy, coca bush, and cannabis plants growing on their lands. If they fail to do so shall be punished pursuant to the provisions of Article 26.

Article 26:
Penalties for Cultivation

1. Whoever plants or cultivates less than 1 jerib of opium poppy or coca bush without having a license shall be sentenced to a term of imprisonment between 6 months and 1 year and a fine between 10,000 Afs and 50,000 Afs.
2. Whoever plants or cultivates 1 jerib or more of opium poppy or coca bush shall, for each “beswa” (100 square meters) in excess of 1 jerib, be sentenced to imprisonment for 1 month and fine of 5,000 Afs, which penalty shall be in addition to the penalty prescribed in paragraph 1 of this article.
3. Whoever plants or cultivates less than 1 jerib of cannabis plants shall be sentenced to imprisonment for 3 to 9 months and a fine between 5,000 and 20,000 Afs.
4. Whoever plants or cultivates more than 1 jerib of cannabis plants, shall, for each beswa in excess of 1 jerib, be sentenced to imprisonment for 15 days and a fine of

- 2,500 Afs, which penalty shall be in addition to the penalty prescribed in paragraph 3 of this article.
5. Whoever encourages, causes, incites, or finances any person to plant or cultivate opium poppy, coca bush, or cannabis plants shall be sentenced to twice the penalties of the farmer in accordance with the provisions of paragraphs 1, 2, 3, and 4 of this article.
 6. Illicit opium poppy, coca bush, or cannabis plants shall be destroyed and any person associated with the cultivation or planting shall not be entitled to any compensation, in addition to the penalties set forth in this article.

Article 27:

Consumption of illegal drugs, and treatment of dependant persons or addicts

1. Any person who uses or possesses for the purpose of personal consumption any substance or mixture containing a substance listed in Tables 1 through 4, other than as authorized for medical treatment or by this law, shall be punished as follows:
 - (a) Heroin, morphine, and cocaine, or any mixture containing those substances: 6 months to 1 year imprisonment and a fine between 20,000 to 50,000 Afs.
 - (b) Opium or any mixture containing that substance: 3 months to 6 months imprisonment and a fine of between 10,000 Afs to 25,000 Afs.
 - (c) Substances or any mixture containing substances listed in Tables 1 through 4, with the exception of those in paragraphs 1 and 2 of this article: 1 month to 3 months imprisonment and a fine of between 5,000 Afs to 10,000 Afs.
 - (d) Possession of more than 1 gram of heroin, morphine, or cocaine, or 10 grams of opium or hashish, shall be subject to the penalties set forth in Article 16.
2. If a medical doctor certifies that a person is addicted to an illegal drug substance listed in Tables 1 through 4, the court may exempt the person from imprisonment and fine. In this case, the court may require an addicted person to attend a detoxification or drug treatment center.
3. Detoxification or drug treatment centers shall report to the sentencing court through the office of the prosecutor every 15 days on the health condition of persons sentenced to detention and treatment. On the basis of the report received, the court can abrogate or extend the period of detention and treatment.

4. Any person sentenced to a period of detention in a detoxification or drug treatment center shall receive credit on any sentence of imprisonment for the time served in the treatment center.
5. Any person in control of a vehicle while under the influence of any narcotic or psychotropic substance listed in Tables 1 through 3 shall be sentenced to a term of imprisonment of between six months and one year and a fine of 10,000 to 20,000 Afs.

Article 28:
Vehicles

1. Whoever without legal authorization intentionally carries, transports, or conceals more than 10 grams of heroin, morphine, or cocaine; or more than 20 grams of opium; or more than 100 grams of hashish or any other substance listed in Tables 1 through 4 in his vehicle shall have the vehicle confiscated, in addition to the punishment prescribed in this law.
2. Any vehicle owner who without legal authorization intentionally allows a vehicle to be used to carry, transport, or conceal more than 10 grams of heroin, morphine, or cocaine; or more than 20 grams of opium; or more than 100 grams of hashish or any other substance listed in Tables 1 through 4 shall be punished as an accomplice to the crime and shall have the vehicle confiscated.
3. Any vehicle seized in relation to a drug-trafficking offense shall be registered and officially handed over to the nearest customs office and following the completion of its confiscation in accordance with the provisions of the relevant law, it shall be placed on sale and the proceeds be deposited to the government treasury.

Article 29:
Repeat offenders

If any person who has been convicted more than once of an offense listed in Articles 16, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, or 28 of this law commits a narcotics offense again, he shall be sentenced to the maximum penalty provided for that offense.

Article 30:
Home Leave

The provisions of Article 37 of the Law of Prisons and Detention Centers shall not apply to those who have committed crimes prescribed in this law and have been sentenced to a term of more than 5 years imprisonment.

Article 31:
Penalty Aggravation

1. Except as provided for under this law, the penalty aggravation provisions of the Penal Code shall apply to violent actions of drug-trafficking offenders.
2. The provisions of other laws with regard to the suspension of sentences, judicial leniency, and probation shall not apply to convicts of drug-trafficking offenses.

Article 32:
Licensing and Reporting Violations

Whoever does not comply with the provisions of this law and the relevant regulation on the issuance of licenses, authorizations or reporting, and provides for the issuance of a license or an authorization knowing that it will be abused, shall be sentenced to 6 months to 1 year imprisonment and a fine between 50,000 and 100,000 Afs. If the person repeats the violation, he shall be sentenced to 1 to 3 years imprisonment and a fine between 150,000 and 350,000 Afs.

Article 33:
Commission on the Assessment of Drug-Related Offenses and Penalties

1. In order to study and assess the patterns of drug-trafficking offenses across the country, the Commission on the Assessment of Drug-Related Offenses and Penalties (hereinafter the Commission) shall be established with the following composition:
 - a. One authorized representative from the Supreme Court;
 - b. One authorized representative from the Office of the Attorney General;
 - c. One authorized representative from the Ministry of Counter-Narcotics;
 - d. One authorized representative from the Ministry of Interior;
 - e. One authorized representative from the Ministry of Public Health;
 - f. One authorized representative from the National Security Directorate;
 - g. One defense lawyer appointed by the Minister of Justice.

Members of the Commission shall be appointed for a period of four years and shall elect one from among themselves as Chairperson for a two-year term.

3. The Commission shall have the following duties and authorities:
 - a. Studying and assessing the patterns of drug-trafficking offenses in the country and collecting the relevant data;
 - b. Preparing proposals on the amendment of the provisions of this law on drug-related offenses and penalties on the basis of the data collected on the

- offenses and presenting the same, through the Ministry of Counter-Narcotics, to the Government within 60 days of their development;
- c. Recording the committed drug-trafficking offenses;
 - d. Preparing an annual report on drug-trafficking offenses and presenting it to the Government;
 - e. Holding hearing sessions for considering possible changes in the penalties prescribed for drug-related offenses.
4. The administrative costs of the Commission and its secretariat shall be funded from the budget of the Ministry of Counter-Narcotics. The Ministry shall also pay an appropriate salary to the defense lawyer and appropriate attendance fees to other members of the Commission.
5. Citizens of Afghanistan may freely file their complaints on drug-related offenses with the Commission. Reviewing complaints, holding meetings and other activities of the Commission shall be regulated through procedures adopted by the Commission.
6. Any amendment to this law proposed by the Commission shall be presented to the National Assembly following its approval by the Government.

CHAPTER V
Adjudication of drug-related offenses

Article 34:
Narcotics Tribunals

1. In accordance with the provisions of Articles 32 and 50 of the Law Concerning the Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, a Narcotics Tribunal within the Kabul Primary Provincial Court and a Narcotics Tribunal within the Kabul Appellate Provincial Court are hereby established.
2. Each of the tribunals set forth in paragraph 1 of this article shall be composed of one President and six members.
3. The Presidents of the tribunals shall be responsible for leading and managing the affairs of their respective tribunals and shall preside over judicial proceedings in accordance with the provisions of Articles 37 and 43 of the Law Concerning the Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan.
4. The tribunals set forth in paragraph 1 of this article shall exercise exclusive jurisdiction throughout Afghanistan over drug trafficking offenses in the following cases:
 - (a) Two or more kgs. of heroin, morphine, or cocaine, or any mixture containing those substances;
 - (b) Ten or more kgs. of opium or any mixture containing opium; and
 - (c) Fifty or more kgs. of hashish or any mixture containing substances listed in Tables 1 through 4, with the exception of heroin, morphine, cocaine, and opium.
5. If the amount of narcotic drugs is less than those set forth in paragraph 4 of this article, the case comes under jurisdiction of the Public Security Tribunals of Provincial Courts.
6. Adjudication of drug-related offenses shall be in conformity with the provisions of the Law Concerning the Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan and other relevant laws.
7. The appointment of the Judges of the Central Narcotics Tribunals and the regulation of other affairs related to their promotion and retirement shall be conducted in accordance with the provisions of the Law Concerning the Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan.

8. The amounts and types of narcotic drugs set forth in paragraph 4 over which the Narcotics Tribunals shall exercise exclusive jurisdiction throughout Afghanistan shall be subject to amendment in accordance with the procedures set forth in Article 33.
9. The Central Narcotics Tribunal shall also have jurisdiction over criminal offenses connected or related to drug trafficking offenses set forth in sub-paragraphs 1, 2, and 3 of paragraph 4 of this article.

Article 35:
Investigation, Prosecution, Trial, and Extradition

1. Investigation, prosecution, and the trial of persons involved in drug-trafficking offenses shall be carried out in accordance with the provisions of the Criminal Procedure Code and other relevant laws, and the penalties shall be prescribed in accordance with the provisions of this law. In case this law lacks the required provisions to decide on a penalty, the provisions of the Penal Code shall apply.
2. Suspects accused or convicted of drug trafficking offenses shall be extradited in accordance with the provisions of the 1988 United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, and in accordance with international agreements that may be signed with other countries.

Article 36:
Special Counter Narcotics Saranwal

1. The Office of the Attorney General shall create a Special Counter Narcotics Saranwal within its office to investigate and prosecute the offenses under this law.
2. The Special Counter Narcotics Saranwal shall have exclusive jurisdiction over investigation and prosecution of drug-trafficking offenses set forth in paragraph 4 of Article 34 of this law, and shall cooperate with other law enforcement officials in conducting their investigations.
3. The investigation and prosecution of drug-trafficking offenses involving amounts of drugs less than those set forth in paragraph 4 of article 34 of this law shall be the jurisdiction of other relevant Saranwalis in accordance with the provisions of law.
4. The appointment of the prosecutors and the handling of other affairs related to their promotion and retirement shall be carried out in accordance with the provisions of the law.

Article 37:

Duties of the Counter Narcotics Police

1. The Counter Narcotics Police of Afghanistan and other law enforcement authorities referred to in paragraph 2 of this article shall be responsible for detecting drug trafficking offenses in Afghanistan.
2. The following law enforcement agencies may seize illegal drugs, drug crimes proceeds, and related materials and equipment:
 - (a) the Counter Narcotics Police;
 - (b) the Afghan Special Narcotics Force;
 - (c) the National Police;
 - (d) the Border Police;
 - (e) the Afghanistan Customs staff.
3. All seizures of illegal drug substances, evidence, and proceeds by any of the law enforcement agencies referred to in paragraph 2 of this article shall be reported immediately to the Counter Narcotics Police. The Counter Narcotics Police shall transmit the report as soon as practicable to the National Headquarters of the Counter Narcotics Police, the Ministry of Counter Narcotics, the Office of the Attorney General, and the Commission on the Assessment of Drug-Related Offenses and Penalties.
4. All seizures of illegal drug substances, evidence, and proceeds by any law enforcement authorities referred to in paragraph 2 of this article shall be turned over to the Counter Narcotics Police as soon as practicable.
5. Law enforcement agencies referred to in paragraph 2 of this article shall, at the request of Counter Narcotics Police, provide additional security to protect seized drugs, evidence, proceeds, and suspects.
6. The Counter Narcotics Police shall have the authority to question and interrogate all the perpetrators of the drug-trafficking offenses under this law.
7. The Counter Narcotics Police of Afghanistan shall refer perpetrators of the offenses under paragraph 4 of Article 34 of this law to the Special Counter Narcotics Saranwal for investigation and prosecution. If the amount of drugs seized is less than those set under paragraph 4 of article 34 of this law, the respective cases shall be referred to the concerned Saranwalis for investigation and judicial prosecution.

8. If the amount of drugs seized is less than those set under paragraph 4 of Article 34 of this law, the law enforcement agencies named under paragraph 2 of this article shall complete the questioning and interrogation of the suspects within 72 hours and refer the concerned cases to the respective Saranwalis for investigation and judicial prosecution.
9. In cases where a seizure of quantities of narcotic drugs as set under paragraph 4 of Article 34 of this law is made outside Kabul Province and the offenders are arrested, the law enforcement agencies referred to in paragraph 2 of this article shall have up to, but not longer than, 72 hours from the time of arrest to prepare a report of the arrest and turn the accused over to the Primary Saranwal. As soon as possible, but not longer than 15 days after the arrest, the Counter Narcotics Police shall transfer the investigation, the evidence, and the accused to the Headquarters of the Counter Narcotics Police in Kabul for further questioning and interrogation. The time period for the questioning and interrogation of the accused shall begin upon the date the accused physically arrives in Kabul in the custody of the Counter Narcotics Police, but the time period for the turning over of the accused to the Special Counter Narcotics Saranwal shall in no event exceed 15 days from the date of arrest. The Special Narcotics Saranwal, upon being notified, shall inform the Primary Central Narcotics Tribunal in Kabul of such arrests outside Kabul Province, and obtain an order from the Court extending the dates for indictment. It shall investigate and prosecute the case in accordance with the provisions set forth in Article 36 of the Interim Criminal Procedure Code.

Article 38:
Reports on drug seizures

1. A report shall be prepared by the person responsible for the seizure of illegal drugs and shall contain the following information:
 - (a) The type of illegal drug seized, and a physical description of the seizure, including any packaging containing the drugs;
 - (b) The quantity of illegal drugs seized;
 - (c) The time, date and place of the seizure;
 - (d) The organization and person responsible for the seizure;
 - (e) The name, date of birth, address, and signature and fingerprints of any person arrested in connection with the seizure;
 - (f) A factual description of the circumstances of the seizure.
2. The report shall be signed by the person responsible for the seizure and a member of the Counter Narcotics Police if present. One copy of the report shall be kept by

each of the signatories to the report. Additional copies shall be submitted to the Saranwal for inclusion in the investigation dossier, and to the Ministry of Counter Narcotics.

Article 39:

Destruction of illegal drugs and preservation of evidence

The illegal drugs seized shall be destroyed in accordance with the following procedures:

- (a) All drugs seized shall be turned over to the custody of the Counter Narcotics Police as soon as possible.
- (b) Authorized representatives of the Counter Narcotics Police and the concerned Saranwal shall weigh and photograph the entire amount seized, and take samples of the drugs for testing, in accordance with written procedures which shall be established by the Attorney General. The Ministry of Counter Narcotics, or its provincial offices, shall be informed about this sampling process.
- (c) After samples of the drugs are taken, the remaining drugs shall be re-weighed to ensure that the original amount seized is not less than it was after the sample was taken.
- (d) The Saranwal shall issue a written order authorizing the destruction of the drugs after they have been photographed, sampled, and reweighed.
- (e) Representatives of the Counter Narcotics Police and the Saranwal shall prepare and sign an exact report containing the information required under this article and keep a record of the same.
- (f) The Counter Narcotics Police shall destroy the remaining illegal drugs as soon as possible in the presence of representatives of the Saranwal. The Ministry of Counter Narcotics shall be advised of and may participate in this process.

Article 40:

Afghan Special Narcotics Force

- 1. A Special Narcotics Force is established within the Ministry of Interior to detain those involved in drug trafficking, to seize illegal drugs, and to use reasonable force in the conduct of its operations, including against those who impede its operations.
- 2. The Special Narcotics Force shall hand over any suspects and evidence in its custody associated with a drug seizure to the Counter Narcotics Police of Afghanistan pursuant to the procedures set forth in Articles 37, 38, and 39.

3. The Special Narcotics Force shall have the power to destroy illegal drugs, if necessary.

Article 41:

Co-operation with law enforcement agencies

1. If an accused cooperates considerably with the responsible authorities in investigation and trial in detecting or arresting other perpetrators, the prosecutor can request to sentence the accused to up to 50% of the minimum penalty prescribed for the perpetrated crime.
2. Any person who provides authentic information relating to drug trafficking offenses or offenders, or arrests, or assists in the arrest of, the offenders may be awarded money, depending on the circumstances and the quality and quantity of the drugs seized, at the discretion of the Counter Narcotics Police and in accordance with guidelines which shall be established by the Ministry of Interior.

Article 42:

Confiscation of Assets

1. No person may retain any benefits or assets, whether immovable or movable, acquired directly or indirectly by the commission of a criminal offense under this law.
2. The prosecutor shall provide sufficient evidence in support of the confiscation of benefits or assets in accordance with paragraph 1 of this Article. The court shall consider any evidence produced by the accused to refute the evidence produced by the prosecutor, and shall order confiscation only after it is certain that benefits or assets were acquired directly or indirectly as the result of the commission of a criminal offense under this law.
3. Benefits and immovable or movable assets that may be confiscated or forfeited as a result of the commission of a criminal offense under this law shall include the following:
 - (a) Facilities, material, equipment, movable or immovable assets, funds or any other objects of value directly or indirectly used or intended to be used in committing the crime.
 - (b) Money, funds, objects of material value, and any other income acquired directly or indirectly through committing the crime.
 - (c) Moveable or immovable materials purchased or acquired with the proceeds or income of the crime.

- (d) Salary or other privileges received by legal or natural persons in connection with the crime.
- 4. When funds or assets ordered to be confiscated are not available, funds or assets of equivalent value shall be ordered to be confiscated. This order shall be applicable to funds or assets belonging directly or indirectly to the perpetrators of the offenses under this law.
- 5. If the funds or assets whose confiscation has been ordered have been transferred to another person, the transferred funds or assets shall be confiscated, provided that the person to whom the funds or assets have been transferred was aware of the origin of the funds or assets.
- 6. If the transferee did not know that the funds or assets transferred to him had been acquired by the commission of a criminal offense under this law, he shall have the right to present evidence of his lack of knowledge on this regard to the court.

Chapter VI

Search, Seizure, and Investigation Techniques

Article 43:

Detection, Investigation, and Prosecution

The provisions of this Chapter shall apply to the detection, investigation, and prosecution of drug trafficking and drug trafficking-related offenses, including offenses involving bribery and corruption, violence, and money laundering.

Article 44:

Search of Person

1. Law enforcement authorities search a person where there are justifiable reasons to believe that evidence and forfeitable objects or instruments and funds related to drug-trafficking are concealed on or in the suspect's clothing or body.
2. A strip-search may only be conducted by a law enforcement officer of the same sex. Internal examinations of body orifices may only be carried out by an authorized medical examiner after approval by a local court. Where an individual consents to a body search, the authorization from a court is not needed.
3. Any object or article reasonably relevant to criminal activity may be seized during a search of a person. A record of the reasons for and circumstances of the search, the name of the Judge or other authorizing officer, where applicable, and the disposition of any seized items shall be made. This record can be produced in the future legal proceedings.
4. Evidence properly obtained as a result of a search shall be admissible in all court and other legal proceedings.

Article 45:

Search of Property

1. Law enforcement authorities may enter and search private residences after obtaining a warrant from a relevant court.
2. Convincing reasons that justify the search, and the exact address of the property to be searched, should be explicitly mentioned in the search warrant application.
3. A court may issue a search warrant where there is reasonable cause to believe that evidence, instrumentalities, or proceeds of drug-trafficking, or of other offenses, are stored, maintained, or concealed in or on the premises to be searched. If the owner or the resident of the property consents to a search, there is no need for the court authorization.

4. In exceptional circumstances where there is reasonable cause to believe that evidence, instrumentalities, or proceeds of criminal activity or offenses may be removed or destroyed and the issuance of a search warrant by a court is not possible, law enforcement officers may act pursuant to the provisions of the Criminal Procedure Code.
5. Law enforcement officers may seize all evidence, instrumentalities, or proceeds of criminal activities or offenses, including records maintained in any form, format, or medium, specified in the warrant and are related to drug trafficking offenses. A record of the reasons for and circumstances of the search, the name of the judge or other authorizing officer, where applicable, and the disposition of any seized items shall be made and maintained for all future legal proceedings. Where a search warrant was not obtained prior to a search because of exceptional circumstances, the record shall also include a description of such exceptional circumstances and the attempts made to contact a Sarwanal before the search.
6. Evidence properly obtained pursuant to a search warrant or consent shall be admissible in all court and other legal proceedings. Law enforcement officers shall, following entering and searching a property, obtain a court order establishing the legality of their action within a period of time as set under the law.

Article 46:
Search of Vehicles

1. Law enforcement authorities may stop and search a vehicle where there is reasonable cause to believe that evidence, instrumentalities, or proceeds of drug-trafficking offenses are stored, maintained, or concealed on or within the vehicle, its load, or any trailer.
2. Law enforcement authorities may seize the vehicle and any evidence, instrumentalities, or proceeds of drug-trafficking offenses, including records maintained in any form, format or medium, relevant to such criminal activities or offenses. A record of the reasons for and circumstances of the search and the disposition of any seized items shall be made and maintained for all future legal proceedings. Evidence properly obtained pursuant to an authorized vehicle search shall be admissible in all court and other legal proceedings.

Article 47:
Covert Surveillance

1. Law enforcement authorities and their authorized agents may conduct covert investigative and surveillance activities to gather intelligence and evidence of criminal activities or offenses. Covert investigative and surveillance activities may include:

- recording conversations in public places;
 - conducting mobile or static surveillance with or without the use of electronic or photographic equipment;
 - collecting data related to using, providing, and transmitting telecommunications and other electronic communications, pursuant to written regulations that shall be established by the Attorney General;
 - controlled deliveries of prohibited or other items.
2. A record of the covert surveillance conducted shall be kept.
 3. Evidence properly gained through the authorized use of covert investigative and surveillance methods shall be admissible in all court and other legal proceedings.

Article 48:
Intrusive or Electronic Surveillance

1. Law enforcement authorities and their authorized agents may conduct intrusive investigative and electronic surveillance activities during and in connection with efforts to gather intelligence and evidence relevant to the commission of drug-trafficking offenses. Intrusive or electronic surveillance methods may include:
 - overt or covert recording of conversations in private property, places, and residences;
 - installation and use of electronic or photographic equipment in or on private property, places, or residences;
 - interception of communications, including voice, data and internet communications, conversations and information transmitted by electronic means or media by, from, or through telecommunications companies, internet and computer service providers, or other electronic communications service providers;
 - inspecting bank accounts and records of financial transactions or transfers; and
 - opening and inspecting mail.
2. Evidence properly obtained through the authorized use of overt or covert intrusive investigative and electronic surveillance methods shall be admissible in all court and other legal proceedings.

3. In all cases under this article, the confidentiality of the conversations, mailings, and communications between the accused and his lawyer shall be kept immune from any form of intrusion.

Article 49:
Electronic Interception and Surveillance Standards

1. With the exception of law enforcement agencies or their agents, any person who intentionally —
 - (a) intercepts any wire, oral, or electronic communication;
 - (b) uses any electronic, mechanical, or other device to intercept any oral communication;
 - (c) discloses to any other person the contents of any wire, oral, or electronic communication, knowing that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this Article;
 - (d) uses the contents of any wire, oral, or electronic communication, knowing that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this Article; or
 - (e) discloses to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by this Article,
 - (i) knowing that the information was obtained through the interception of such a communication in connection with a criminal investigation,
 - (ii) having obtained or received the information in connection with a criminal investigation, and
 - (iii) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,

shall be subject to 1 to 5 years imprisonment and a fine of between 20,000 and 100,000 Afs.
2. It shall not be unlawful for an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment.
3. A person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication to any person or

entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient, except -

- (i) as authorized in this Article;
 - (ii) with the lawful consent of the originator or any addressee or intended recipient of such communication;
 - (iii) to a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or
 - (iv) the communications were inadvertently obtained by the service provider and which appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.
4. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom shall be admissible as evidence in any trial, hearing, or other proceeding or before any other official authority if the disclosure of that information would be in violation of this Article.
5. The consent of one of the parties to the communication shall constitute authorization for surveillance, interception, or inspection of communications and information under this Article.
6. An application for the interception of communications shall be prepared by a Saranwal and approved by an authorized official of the Office of the Attorney General. The application shall specify the reasons to believe that:
- (a) the named suspects and others are engaged in the commission of drug trafficking or drug-related offenses;
 - (b) the named suspects and others are using a particular telephone or premises in connection with the commission of the offenses;
 - (c) that wire and/or oral communications of the named suspects and others will be intercepted either over the particular telephone facility and/or within the described premises;
 - (d) the time for which the interception is required to be maintained; and
 - (e) where the application is for the extension of a previous order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.
7. The application for and authorization of surveillance or interception under this section should be in writing but may be made orally if there are urgent or emergency circumstances. The application to conduct an interception shall include sufficient information to justify the use of the type of interception sought.

- The court issuing the Order shall state any conditions or limits to the planned interception or surveillance in the Order authorizing the application. Urgent oral applications and authorizations require the same information and justification as written ones. Written applications and authorizations will be made as soon as practicable following oral authorization and will state the need for urgency.
8. Each Order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify—
 - (a) the identity of the person, if known, whose communications are to be intercepted;
 - (b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
 - (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;
 - (d) the identity of the agency authorized to intercept the communications, and of the person approving the application; and
 - (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.
 9. An Interception Order is valid until the objectives authorized in the Order are attained or 60 days from the day on which the law enforcement officers first begin to conduct an interception under the Order. It shall be renewable for additional 60 day periods upon a showing of continued necessity for interception.
 10. The authorization given shall apply to the target telephone number as well as any changed telephone number within the 60 day period. If the telephone is a cellular telephone, the authorization applies both to the target telephone number as well as any changed telephone number or any other telephone number subsequently assigned to or used by the instrument bearing the same electronic serial number as the target cellular phone within the 60 day period.
 11. Monitoring personnel may listen only to criminal conversations, and must turn off the interception devices when the parties to the conversation engage in non-criminal conversations.
 12. The recordings of the intercepted communications shall be sealed in a container and taken to the court which issued the interception order within 30 days of the end of the authorized interception period in order to protect the recordings from tampering or destruction and to ensure that the contents are not unlawfully disclosed.

13. No provider of wire or electronic communication service, officer, employee, or agent thereof shall disclose the existence of any interception or surveillance or the device used to accomplish the interception or surveillance with respect to which the person has been furnished a court order under this Article, except in case of exigency and then only after prior notification to the Attorney General.
14. When a law enforcement officer intercepts wire, oral, or electronic communications relating to offenses other than those specified in the Interception Order, the contents thereof, and evidence derived therefrom, may be disclosed or used for law enforcement purposes, or disclosed under oath in any proceeding, when the judge finds on subsequent application that the contents were otherwise intercepted in accordance with this Article and the original order. The court shall be notified as soon as practicable that conversations about other offenses are being monitored, and the new offenses shall be added to the original application for the order if an extension order is obtained. If no extension order is obtained and the prosecution wishes to use that evidence in a future proceeding, an order should be obtained as soon as practicable pursuant to this Article.
15. Disclosure of information obtained pursuant to a court-authorized interception order is authorized in the following circumstances:
 - to law enforcement officers for the performance of their official duties. In this case, the law enforcement officers may use the information as required.
 - information may be disclosed during testimony under oath.
16. Information regarding offenses other than those authorized in the order may be disclosed to other law enforcement officers with a court authorization. In this case, they may use the information as required.
17. A law enforcement officer may disclose interception information to other law enforcement, intelligence, protective, immigration, national defense, or national security officials, if the information includes intelligence or counterintelligence, to assist the receiving officials in the performance of their official duties.
18. A law enforcement officer, or other Government official engaged in carrying out official duties, may disclose the contents of intercepted communications and evidence derived therefrom to foreign or domestic investigative or law enforcement officers if such disclosure is appropriate to the proper performance of the official duties of the officers who disclose and who receive the information. Foreign investigative or law enforcement officers may use or disclose such contents or derivative evidence to the extent appropriate to the performance of their official duties.

19. If the contents of intercepted communications or derivative evidence reveals a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, sabotage, terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within Afghanistan or elsewhere, a law enforcement officer, or other Government official engaged in carrying out official duties, may disclose the contents of intercepted communications and evidence derived therefrom to any appropriate Government or foreign government official, for the purpose of preventing or responding to such threat. The foreign official who receives such information may use it consistent with such guidelines as the Office of the Attorney General and the National Security Directorate (NDS) shall jointly issue.
20. The Interception Order issued by the judge may provide in appropriate circumstances and for good cause that the order be sealed, and the surveillance or interception conducted not be disclosed until the conclusion of the investigation or until further order of the court. The order of the court may specify that the methods, means, and techniques used in the interception or surveillance remain secret.
21. The Interception Order issued by the judge may permit law enforcement officers to surreptitiously enter the premises to be surveilled at any time to install or replace a recording or surveillance device, or replace the battery.
22. Communications service providers shall allow designated law enforcement authorities access, as per the Interception Order, to the content of the specified communications at the time of transmission or as soon as practicable thereafter, and shall cooperate with law enforcement authorities in the installation or connection of all technical equipment necessary to the interception and recordation of the communications. Communications service providers and their employees and agents are forbidden to disclose the installation of interception equipment.

Article 50:

Use of Informants

1. Law enforcement authorities may use informants to prevent, detect, and investigate drug-trafficking offenses by gathering intelligence and evidence relevant to the commission of such offenses.
2. An informant may establish or maintain a relationship with a person in order to acquire information or evidence of illegal activities and to provide that information and evidence to law enforcement authorities. Informants may use surveillance techniques described in this Article if authorized by appropriate law enforcement authorities.

3. Informants may not participate in the commission of drug-trafficking offenses in connection with criminal investigations without prior authorization from the appropriate law enforcement authorities. An informant who conducts or participates in criminal activity outside the limit of the authorized conduct may be subject to prosecution for any offense committed.
4. Authorizations for informants to acquire information or participate in crimes shall be recorded in writing and shall specify to the extent practicable the types of actions the informant may engage in or conduct. All information provided by an informant shall be recorded by the officer receiving it.
5. The identity of an informant may be withheld by an order of a court where there is reasonable cause to believe that identifying the informant will subject him to danger or compromise lawful investigations. The order issued by the court may provide in appropriate circumstances that the order be sealed and not be disclosed to another party until the conclusion of the investigation or until further order of the court, and that the methods, means, and techniques used in the investigation remain secret.
6. An informant may testify in court.
7. Evidence properly gained through the authorized use of informants shall be admissible in all detection, investigation, and trial proceedings.
8. Informants shall be recruited in accordance with special procedures established by the Ministry of Interior.

Article 51:
Undercover Operations

1. Law enforcement authorities may conduct undercover or covert operations during and in connection with investigations to gather intelligence and evidence relevant to the commission of drug-trafficking offenses. Undercover or covert operations and methods may include purchasing, selling, or offering to purchase or sell, illicit drugs and controlled substances, or other activities. Undercover or covert operations and methods shall not be used to initiate crimes that would [not] otherwise have been committed. A record of all undercover or covert operations conducted shall be made and maintained.
2. Intelligence includes information relevant to the detection and prevention of drug-trafficking offenses. The source of intelligence may be protected.
3. Evidence properly obtained through the authorized use of undercover or covert operations shall be admissible in all detection, investigation, and trial proceedings.

CHAPTER VII
Duties and Responsibilities of the Ministry of Counter Narcotics and other Ministries

Article 52:
Duties and responsibilities

1. The Ministry of Counter Narcotics shall coordinate the counter-narcotics activities and programs of the Government of Afghanistan with other Ministries, independent bodies, and other concerned organizations.
2. The Ministry of Counter Narcotics, as the leading Ministry in counter narcotics affairs, shall be responsible for coordinating and evaluating the implementation of this Law and the National Drug Control Strategy in the concerned Ministries and organizations, and shall adopt the necessary measures for this purpose in the relevant central and provincial offices.
3. The concerned Ministries and organizations shall present a report, on a monthly basis or upon request, on their counter-narcotic activities to the Ministry of Counter Narcotics.
4. The Ministry of Counter Narcotics shall submit to the Government a quarterly report on the results obtained from the evaluation of the activities and performances of the concerned organizations in combating narcotic drugs.
5. Ministries, agencies and other concerned organizations shall be responsible for the implementation of this law and the National Drug Control Strategy in their respective areas of activity.
6. The Minister for Counter Narcotics, assisted by other Ministries, and other bodies and institutions, shall prepare a National Drug Control Strategy (NDCS), and propose revisions to the strategy at regular intervals but not less than every three years. The Ministry shall be responsible for evaluating the implementation of the NDCS.
7. The Ministry of Counter Narcotics shall coordinate the annual budget of the National Drug Control Strategy with the Ministry of Finance. The Ministry of Counter Narcotics and the Ministry of Finance shall be jointly responsible for the management and implementation of the Counter Narcotics Trust Fund.
8. The Ministries of Counter Narcotics, Interior, Finance, National Defense and other Ministries, bodies and institutions, including but not limited to the Supreme Court, Office of the Attorney General, and National Directorate of Security, shall cooperate and assist one another as required to perform their lawful duties and functions under this law.

Article 53:
Intelligence Duties

1. The National Directorate of Security shall obtain intelligence on drug cultivation, production, and trafficking, and shall prepare strategic and operational intelligence reports related to counter narcotics.
2. Strategic intelligence reports on counter narcotics shall be submitted on a regular basis to the Office of the National Security Adviser, the Ministry of Interior, and the Ministry of Counter Narcotics.

Article 54:
Duties of Other Ministries

1. The Ministry of Public Health, in consultation with the Ministry of Counter Narcotics, shall establish community-based and residential detoxification, harm reduction, treatment and rehabilitation services for persons addicted to or dependant on narcotic drugs and/or psychotropic substances.
2. The Ministry of Education and Ministry of Higher Education shall, in consultation with the Ministry of Counter Narcotics, include illicit drug use prevention-related subjects into the curriculum of their educational institutions.
3. The Ministries of Culture and Information, Public Health, Religious Affairs (Hajj and Awqaf) and other relevant bodies shall, in consultation with the Ministry of Counter Narcotics, promote public campaigns against illegal drug cultivation, production, trafficking, and use.
4. In accordance with the National Drug Control Strategy, and within their competence, the Ministries of Agriculture, Food Stuff and Animal Husbandry, Rural Rehabilitation and Development, Public Health, and Interior shall adopt measures to:
 - (i) Prevent opium poppy and cannabis cultivation through all possible means;
 - (ii) Persuade and encourage farmers to cultivate licit crops.
 - (iii) Provide assistance to farmers.
5. The Ministry of Foreign Affairs shall adopt measures to:
 - (i) Attract assistance from international organizations to assist farmers.
 - (ii) Acquire assistance from international organizations to equip and expand hospitals and rehabilitation centers for drug addicts.

- (iii) Collect reports, publications and information material related to the struggle against drugs from regional and international organizations, and translate and distribute them;
- (iv) Initiate efforts to negotiate agreements with other countries and organizations regarding co-operation in detection, investigation, arrest, prosecution, trial, and extradition of drug-trafficking suspects.
- (v) Negotiate agreements with other countries and international organizations for cooperation and technical and financial assistance to prevent opium, cannabis, and coca cultivation and to combat drug trafficking in Afghanistan.
- (vi) Cooperate with the United Nations and other foreign authorities to prevent the manufacture of instruments, equipment, and machinery used for producing and processing narcotic drugs and psychotropic substances.
- (vii) Present to the Secretary-General of the United Nations an annual report, drafted by the Ministry of Counter Narcotics, on the implementation of the international conventions on illegal drugs.
- (viii) Exchange information and counter-narcotic activities with foreign countries and international organizations.
- (ix) Establishing relations between the International Narcotics Control Board (INCB) and the Counter Narcotics Ministry and other relevant ministries and institutions.
- (x) Designate, in consultation with the Counter Narcotics Ministry, Drug Liaison Officers (DLO) in neighboring, regional and other interested countries.
- (xi) Cooperate with the Counter Narcotics Ministry in holding regional and international conferences on counter-narcotic issues.
- (xii) Consult with the Ministry of Counter Narcotics in formulating and implementing the duties and responsibilities set forth in this paragraph.

CHAPTER VIII

Final Provisions

Article 55: **Responsibility of Security Authorities**

All security authorities shall be responsible for preventing and eradicating the cultivation of opium poppy, cannabis plants, and coca bush in accordance with the instructions of the Government.

Article 56: **Primacy of this law**

1. Where existing laws and regulations conflict with this law, this law shall prevail. All regulations that are incompatible with this law shall be conformed to this law no later than 6 months after the promulgation of this law.
2. The Counter Narcotics Ministry shall issue all regulations required by this law within one year of the promulgation of this law. Pending the promulgation of such regulations, the existing regulations concerning counter narcotics activities shall remain in force if such regulations are not inconsistent with this law.

Article 57: **Cooperation of Ministries**

1. Within 60 days of the promulgation of this law, the Ministry of Counter Narcotics, with the assistance of the Ministry of Interior, shall take the measures necessary to meet the organizational, staffing, funding, and resource requirements of this law.
2. Within 60 days of the promulgation of this law, the Ministry of Counter Narcotics shall, in consultation with the Ministry of Public Health, prepare an organizational plan for the establishment of the Committee on Drug Control. Within 120 days of the promulgation of this Law, the Committee shall convene its inaugural meeting.
3. Within 120 days of the promulgation of this law, the Ministry for Counter Narcotics shall formulate and publish regulations pertaining to its activities and governance.

Article 58: **Entry into Force**

This law shall enter into force from the date of its signing by the President and shall be published in the Official Gazette. Following the promulgation of this law, the Counter Narcotics Law published in the Official Gazette No. 813 dated 13.08.1383 shall be nullified.

Classification Tables

Afghan national classification of narcotic drugs, Psychotropic substances and preparations thereof, as well as substances used in their manufacture

| | |
|---------|--|
| Table 1 | Prohibited drugs of abuse |
| Table 2 | Strictly controlled substances and pharmaceutical preparations (High risk drugs of abuse) |
| Table 3 | Controlled substances and pharmaceutical preparations (Risk drugs of abuse) |
| Table 4 | Substances used in the manufacture of narcotics drugs and psychotropic substances (Precursors) |

Table 1 – Prohibited Drug of Abuse with No Medical Use

| | |
|---------------------------------|--|
| 1. (+)-LYSERGIDE | 45. Ethylmethylthiambutene |
| 2. 2C-B | 46. Eticyclidine |
| 3. 3-methylfentanyl | 47. Etilamfetamine |
| 4. 3-methylthiofentanyl | 48. Etonitazene |
| 5. 4-MTA | 49. Etorphine |
| 6. Acetorphine | 50. Etoxadine |
| 7. Acetyl-alpha-methylfentanyl | 51. Etryptamine |
| 8. Acetyldihydrocodeine | 52. Fenetylline |
| 9. Acetylmethadol | 53. Furethidine |
| 10. Allylprodine | 54. Heroin |
| 11. Alphameprodine | 55. Hydromorphenol |
| 12. Alphamethadol | 56. Hydroxypethidine |
| 13. Alpha-methylfentanyl | 57. Ketobemidone |
| 14. Alpha-methylthiofentanyl | 58. Levomoramide |
| 15. Aminorex | 59. Levophenacylmorphane |
| 16. Benzethidine | 60. MDE, N-ethyl MDA |
| 17. Benzylmorphine | 61. MDMA |
| 18. Betacetylmethadol | 62. Mecloqualone |
| 19. Bêta-hydroxyfentanyl | 63. Mescaline |
| 20. Bêta-hydroxy-methylfentanyl | 64. Methaqualone |
| 21. Betameprodine | 65. Methcathinone |
| 22. Betamethadol | 66. Methyl-4 aminorex |
| 23. Betaprodine | 67. Methyl-desorphine |
| 24. Brolamfetamine | 68. Methyl-dihydromorphine |
| 25. Butyrate de dioxaphetyl | 69. MMDA |
| 26. Cannabis and cannabis resin | 70. Morpheridine |
| 27. Cathinone | 71. Morphine methobromide and other pentavalent nitrogen morphine derivative |
| 28. Clonitazene | 72. MPPP |
| 29. Concentrate of poppy straw | 73. Myrophine |
| 30. Desomorphine | 74. N-hydroxy MDA |
| 31. DET | 75. Nicocodine |
| 32. Dextromoramide | 76. Nicomorphine |
| 33. Diampromide | 77. Noracymethadol |
| 34. Diethylthiambutene | 78. Norlevorphanol |
| 35. Difenoxine | 79. Normethadone |
| 36. Dimenoxadol | 80. Normorphine |
| 37. Dimepheptanol | 81. Norpipanone |
| 38. Dimethylthiambutene | 82. Para-fluorofentanyl |
| 39. Dipipanone | 83. Parahexyl |
| 40. DMA | 84. PEPAP |
| 41. DMHP | 85. Phenadoxone |
| 42. DMT | 86. Phenampromide |
| 43. DOET | |
| 44. Drotebanol | |

87. Phenomorphan
88. Phenoperidine
89. Pholcodine
90. Piritramide
91. PMA
92. Poppy seeds
93. Poppy straw
94. Proheptazine
95. Properidine
96. Propiram
97. Psilocine, psilotsin
98. Psilocybine
99. Racemoramide
100. Rolicyclidine
101. STP, DOM
102. Tenamfetamine
103. Tenocyclidine
104. Tetrahydrocannabinol, the following isomers and their stereochemical variants:
 - tetrahydro-7,8,9,10 trimethyl-6,6,9 pentyl-3 6H-dibenzo[b,d] pyranne o1-1
 - (9R, 10aR)-tetrahydro-8,9,10,10a trimethyl-6,6,9 pentyl-3 6H-dibenzo[b,d]pyranne o1-1
 - (6aR,9R, 10aR)-tetrahydro-6a,9,10,10a trimethyl-6,6,9 pentyl-3 6H-dibenzo[b,d] pyranne o1-1
 - (6aR,10aR)-tetrahydro-6a,7,10,10a trimethyl-6,6,9 pentyl-3 6H-dibenzo[b,d] pyranne o1-1
 - tetrahydro-6a,7,8,9-trimethyl-6,6,9 pentyl-3 6H-dibenzo[b,d] pyranne o1-1
 - (6aR,10aR)-hexahydro-6a,7,8,9,10,10a dimethyl-6,6 methylene-9 pentyl-3 6Hdibenzo [b,d] pyranne o1-1
105. Thebaine
106. Thiofentanyl
107. Tilidine
108. TMA
109. Trimeperidine

Table 2 – Strictly controlled plants and substances with a medical use

| | |
|--|--------------------------------|
| 1. Alfentanil | 30. Metazocine |
| 2. Alphaprodine | 31. Methadone |
| 3. Amfetamine | 32. Methadone intermediate |
| 4. Amobarbital | 33. Methylphenidate |
| 5. Anileridine | 34. Metopon |
| 6. Bezitramide | 35. Moramide, intermediaire du |
| 7. Coca, (leaf) | 36. Morphine |
| 8. Cocaïne | 37. Nicodicodine |
| 9. Codeine | 38. Norcodeine |
| 10. Codoxime | 39. N-oxymorphine |
| 11. Delta-9-tetrahydro cannabinol and its variants | 40. Opium |
| 12. Dexamfetamine | 41. Oxycodone |
| 13. Dextropropoxyphene | 42. Oxymorphone |
| 14. Dihydrocodeine | 43. Pethidine |
| 15. Dihydromorphine | 44. Pethidine, intermediate A |
| 16. Diphenoxylate | 45. Pethidine, intermediate B |
| 17. Dronabinol | 46. Pethidine, intermediate C |
| 18. Ecgonine, its esters and derivatives | 47. Phenazocine |
| 19. Ethylmorphine | 48. Phencyclidine |
| 20. Fentanyl | 49. Phenmetrazine |
| 21. Glutethimide | 50. Piminodine |
| 22. Hydrocodone | 51. Racemate de metamfetamine |
| 23. Hydromorphone | 52. Racemethorphan |
| 24. Isomethadone | 53. Racemorphane |
| 25. Levamfetamine | 54. Remifentanil |
| 26. Levomethamphetamine | 55. Secobarbital |
| 27. Levomethorphanol | 56. Sufentanil |
| 28. Levorphanol | 57. Thebaïne |
| 29. Metamfetamine | 58. Zipeprol |

Table 3 – Controlled plants and substances with a medical use

| | |
|-------------------------|--------------------------|
| 1. Acetyldihydrocodeine | 39. Loflazepate Ethyl |
| 2. Allobarbital | 40. Loprazolam |
| 3. Alprazolam | 41. Lorazepam |
| 4. Amfepramone | 42. Lormetazepam |
| 5. Barbital | 43. Mazindol |
| 6. Benzfetamine | 44. Medazepam |
| 7. Bromazepam | 45. Mefenorex |
| 8. Brotizolam | 46. Meprobamate |
| 9. Buprenorphine | 47. Mesocarbe |
| 10. Butalbital | 48. Methylpheno-barbital |
| 11. Butobarbital | 49. Methypylone |
| 12. Camazepam | 50. Midazolam |
| 13. Cathine | 51. Nicocodine |
| 14. Chlordiazepoxide | 52. Nicodicodine |
| 15. Clobazam | 53. Nimetazepam |
| 16. Clonazepam | 54. Nitrazepam |
| 17. Clorazepate | 55. Norcodeine |
| 18. Clotiazepam | 56. Nordazepam |
| 19. Cloxazolam | 57. Oxazepam |
| 20. Codeine | 58. Oxazolam |
| 21. Cyclobarbitol | 59. Pemoline |
| 22. Delorazepam | 60. Pentazocine |
| 23. Diazepam | 61. Pentobarbital |
| 24. Dihydrocodeine | 62. Phendimetrazine |
| 25. Estazolam | 63. Phenobarbital |
| 26. Ethchlorvynol | 64. Phentermine |
| 27. Ethinamate | 65. Pholcodine |
| 28. Ethylmorphine | 66. Pinazepam |
| 29. Fencamfamine | 67. Pipradrol |
| 30. Fenproporex | 68. Prazepam |
| 31. Fludiazepam | 69. Pyrovalerone |
| 32. Flunitrazepam | 70. Secbutabarbital |
| 33. Flurazepam | 71. Temazepam |
| 34. GHB | 72. Tetrazepam |
| 35. Halazepam | 73. Triazolam |
| 36. Haloxazolam | 74. Vinylbital |
| 37. Ketazolam | 75. Zolpidem |
| 38. Lefetamine | |

Table 4 – Substances frequently used in the manufacture of narcotic drugs and psychotropic substances (chemical precursors)

- | | |
|---|------------------------|
| 1. Acid N-acetylanthranilic | 12. Piperonal |
| 2. Acid lysergic | 13. Pseudoephedrine |
| 3. Anhydride acetic | 14. Safrole |
| 4. Ephedrine | 15. Acetone |
| 5. Ergometrine | 16. Acid anthranilic |
| 6. Ergotamine | 17. Acid chlorhydric |
| 7. Isosafrole | 18. Acid phenylacetic |
| 8. Methylenedioxy-3,4 phenyl propanone-2 | 19. Acid sulfuric |
| 9. Norephedrine | 20. Methyl ethylcetone |
| 10. Potassium Permanganate | 21. Piperidine |
| 11. Phenyl-1 propanone-2 | 22. Toluene |
| | 23. Ethyl ether |

QUESTIONNAIRE ON CRIMINAL LAW IN AFGHANISTAN

*Thank you for taking the time to fill out this questionnaire. It relates to efforts to reform the criminal justice system in Afghanistan and specifically to the Interim Criminal Procedure Code for Courts 2003('ICPC'). It would be very helpful if you could complete it to the best of your ability and return it to me at the address provided at the end of the questionnaire. **All responses will remain anonymous.***

1. What organisation to you work for?
2. Which one of the following best describes your occupation or role in the justice sector in Afghanistan?
 - (a) Judge
 - (b) Prosecutor
 - (c) Defence lawyer
 - (d) International advisor
 - (e) Other (please specify)
3. How long have you been in practicing in this capacity?
4. What is your citizenship?

INTERIM CRIMINAL PROCEDURE CODE 2004

If you have experience or knowledge of the Interim Criminal Procedure Code 2004 ('ICPC'), please answer the following questions.

1. Do you feel that you have had sufficient resources (books, transport etc) in order to be able to fulfil your responsibilities and meet the timelines (for example, in relation to investigation, trial and detention) laid down by the ICPC?

Please give reasons for your answer

2. In your experience do the police and legal practitioners who use and apply the ICPC regard formal state legislation such as the ICPC as meaningful and appropriate for Afghanistan as a means of investigating and prosecuting criminal offences?
3. Do you regard the provisions of the ICPC as appropriate for Afghanistan as a means of investigating and prosecuting criminal offences in Afghanistan?

4. To what extent in general terms do you feel the ICPC has been successful in providing enforcement agencies and judicial actors (police, prosecutors and judges) with effective mechanisms to investigate and prosecute criminal offences in Afghanistan?

5. Do you believe that the establishment of formal state legislation such as the ICPC is the most appropriate way of improving criminal justice in Afghanistan?

Please give reasons for your answer

6. If the provisions of the ICPC were designed to make the work of the Afghan criminal police and judges easier and compliant with international human rights do you think that it has succeeded in this respect?

Please give reasons for your answer

7. How, in your experience, is the ICPC being applied by the police and by legal practitioners?

8. Do you believe that a more effective formal state criminal procedure code could have been drafted and enacted in 2003 or that the ICPC was appropriate at the time?

Please give reasons for your answer. If 'yes' please explain what measures you feel the legislation should have contained which are not included in the

9. In your experience do legal practitioners always adhere to the provisions of the ICPC when they are applicable?

Yes/No. If 'no', please specify any examples without naming any individuals who may be concerned to ensure anonymity.

10. Do you think that it is difficult to know which state legislation to apply in certain circumstances? (Police Law, ICPC, CNL, Penal Code etc)

No/Yes.

If 'yes', please specify examples.

11. Do you think the training was sufficient and appropriate in relation to the provisions and procedures of the ICPC?

Please give reasons for your answer

12. Do you believe that the ICPC would be more effective if it contained more traditional customary justice mechanisms to investigate and prosecute criminal offences in Afghanistan?

Please give reasons for your answer

13. Do you believe that there was a sufficient and appropriate level of input by foreign consultants and international actors in the drafting of the ICPC?

Please give reasons for your answer

14. In your view has the involvement of international actors in the drafting and implementation of the ICPC affected its legitimacy in Afghanistan?

Please give reasons for your answer. If 'yes' please explain why and also whether you think that it could have been foreseen.

15. In what ways, if any, could the ICPC be improved in your view?

Thank you for taking the time to complete this questionnaire. Please return it to John Jupp on j.jupp@londonmet.ac.uk or post it to me at LPC Department, The Department of Law, Governance and International Relations, London Metropolitan University, 16 Goulston Street, London E1 7TP, United Kingdom. As stated above, all answers will remain anonymous.

QUESTIONNAIRE ON CRIMINAL LAW IN AFGHANISTAN

*Thank you for taking the time to fill out this questionnaire. It relates to efforts to reform the criminal justice system in Afghanistan and specifically to the Interim Criminal Procedure Code for Courts 2004 ('ICPC'). It would be very helpful if you could complete it to the best of your ability and return it to me at the address provided at the end of the questionnaire. **ALL RESPONSES WILL REMAIN ANONYMOUS.***

1. What kind of organization do you work for?
(a) *Governmental*
(b) *Non-Governmental (NGO)*
(c) *Inter-Governmental*
(d) *Bi-lateral*
(e) *Other (please describe)*
2. At what level do you work?
3. What are your job responsibilities?
4. How long have you worked in this capacity?
5. What is your citizenship?
6. What has been your involvement with the criminal justice system in Afghanistan?

INTERIM CRIMINAL PROCEDURE CODE FOR COURTS 2004

Please answer the following questions relative to your experience of the Interim Criminal Procedure Code for Courts 2004 ('ICPC'). The terms 'judicial actors' and 'enforcement agencies' refer to police, prosecutors and judges. If you are not familiar with the ICPC please forward this questionnaire to anyone you know who is.

1. What aspects of the ICPC are in your view least well understood by the enforcement agencies, judicial actors and the local population?

2. Have the enforcement agencies and judicial authorities in your view received sufficient and appropriate training in relation to the provisions of the ICPC, their use and application?

Please give reasons for your answer

3. Is the ICPC effectively and equally applied and enforced by judicial actors and enforcement agencies across the country?

If not, why not?

4. Do enforcement agencies and judicial authorities have sufficient resources and/or capacity to meet the timelines laid down by the ICPC for detention, investigation and trial?

If not, why not?

5. To what extent has the ICPC achieved its objectives of providing an efficient and fair criminal justice procedure compliant with international human rights?

6. Do you think that the ICPC is meaningful and appropriate for Afghanistan as a means of investigating and prosecuting criminal offences?

Please give reasons for your answer

7. Is it appropriate for Afghanistan to have a codified state law on criminal procedure or would it be more meaningful for Afghans to rely on customary justice mechanisms?

8. What do you think are the benefits of the ICPC and what are the problems with it?

9. Do you have any further comments on the ICPC generally?

*Thank you for taking the time to complete this questionnaire. Please return it to John Jupp on j.jupp@londonmet.ac.uk or post it to me at LPC Department, The Department of Law, Governance and International Relations, London Metropolitan University, 16 Goulston Street, London E1 7TP, United Kingdom. **ALL RESPONSES WILL REMAIN ANONYMOUS.***

QUESTIONNAIRE ON CRIMINAL LAW IN AFGHANISTAN

*Thank you for taking the time to fill out this questionnaire. It relates to efforts to reform the criminal justice system in Afghanistan and specifically to the Counter Narcotics Law 2005 ('CNL'). It would be very helpful if you could complete it to the best of your ability and return it to me at the address provided at the end of the questionnaire. **All responses will remain anonymous.***

1. What organisation to you work for?
2. Which one of the following best describes your occupation or role in the justice sector in Afghanistan?
 - (a) Judge
 - (b) Prosecutor
 - (c) Defence lawyer
 - (d) International advisor
 - (e) Other (please specify)
3. How long have you been in practicing in this capacity?
4. What is your citizenship?

COUNTER NARCOTICS LAW 2005

If you have experience or knowledge of the Counter Narcotics Law 2005 ('CNL'), please answer the following questions. Please note that for the purposes of this questionnaire, 'police' includes the Counter Narcotics Police of Afghanistan, the Afghan Special Narcotics Force, the Afghanistan National Police, the Afghanistan Border Police and the Afghanistan customs staff:

1. What is your experience of working with the CNL?
 - (a) As a judge
 - (b) As a prosecutor
 - (c) As a defence lawyer
 - (d) Other (please specify)
2. Do you feel that you have had sufficient resources (books, transport etc) in order to be able to fulfil your responsibilities and meet the timelines (for example, in relation to investigation, trial and detention) laid down by the CNL?

3. In your experience do the police and legal practitioners who use and apply CNL regard formal state legislation such as the CNL as a meaningful and appropriate for Afghanistan as a means of investigating and prosecuting criminal offences related to narcotics in Afghanistan?

4. Do you regard the provisions of the CNL as appropriate for Afghanistan as a means of prosecuting offences related to the cultivation, production, use and trafficking of narcotic drugs in Afghanistan?

Yes/No

Please give reasons for your answer

5. To what extent in general terms do you feel the CNL has been successful in providing enforcement agencies and judicial actors (police, prosecutors and judges) with effective mechanisms to investigate and prosecute criminal offences related to narcotics in Afghanistan?

6. Do you believe that the establishment of formal state legislation such as the CNL is the most appropriate way of improving criminal justice in relation to narcotics in Afghanistan?

Yes/No

Please give reasons for your answer

7. How, in your experience, is the CNL being applied by the police and by legal practitioners?

8. In your experience do legal practitioners always adhere to the provisions of the CNL when they are applicable?

Yes/No. If 'no', please specify any examples without naming any individuals who may be concerned to ensure anonymity.

9. Have you any experience of any difficulty personally or by anyone else in understanding which law to apply in any given circumstance (Police Law, ICPC, CNL etc)?

No/Yes. If so, please specify examples.

10. What training have you received in relation to the provisions and procedures of the CNL?

11. Do you think the training was sufficient and appropriate?

Yes/No

Give reasons for your answer

12. Do you believe that the CNL would be more effective if it contained more traditional customary justice mechanisms to investigate and prosecute narcotics offences in Afghanistan?

Yes/No

Please give reasons for your answer

13. In what ways, if any, could the CNL be improved in your view?

Thank you for taking the time to complete this questionnaire. Please return the survey to John Jupp on j.jupp@londonmet.ac.uk or post it to me at LPC Department, The Department of Law, Governance and International Relations, London Metropolitan University, 16 Goulston Street, London E1 7TP, United Kingdom. As stated above, all answers will remain anonymous.

QUESTIONNAIRE ON CRIMINAL LAW IN AFGHANISTAN

*Thank you for taking the time to fill out this questionnaire. It relates to efforts to reform the criminal justice system in Afghanistan and specifically to the Counter Narcotics Law 2005 ('CNL'). It would be very helpful if you could complete it to the best of your ability and return it to me at the address provided at the end of the questionnaire. **ALL RESPONSES WILL REMAIN ANONYMOUS.***

What kind of organization do you work for?

- (a) Governmental
- (b) Non-Governmental (NGO)
- (c) Inter-Governmental
- (d) Bi-lateral
- (e) Other (please describe)

2. At what level do you work?

3. What are your job responsibilities?

4. How long have you worked in this capacity?

5. What is your citizenship?

6. What has been your involvement with the criminal justice system in Afghanistan?

COUNTER NARCOTICS LAW 2005

Please answer the following questions relative to your experience of the Counter Narcotics Law 2005 ('CNL'). The terms 'judicial actors' and 'enforcement agencies' refer to the police, prosecutors and judges. 'Police' includes the Counter Narcotics Police of Afghanistan, the Afghan Special Narcotics Force, the Afghanistan National Police, the Afghanistan Border Police and the Afghanistan customs staff. If you are not familiar with the CNL please forward this questionnaire to anyone you know who is.

USE AND APPLICATION

1. What aspects of the CNL are in your view least well understood by the enforcement agencies, judicial actors and the local population?

2. Have the enforcement agencies and judicial authorities in your view received sufficient and appropriate training in relation to the provisions of the CNL, their use and application?

Please give reasons for your answer

3. Is the CNL effectively and equally applied and enforced by judicial actors and enforcement agencies across the country?

If not, why not?

4. Do enforcement agencies and judicial authorities have sufficient resources and/or capacity to meet the timelines laid down by the CNL for detention, investigation and trial?

5. To what extent has the CNL achieved its objectives and provided enforcement agencies and judicial actors with effective mechanisms to arrest, detain, investigate, prosecute and convict suspects connected with the cultivation, production, trafficking and use of narcotic drugs in Afghanistan?

6. In your view has the CNL helped the Afghan government to attract the co-operation of national and international organisations, and to monitor and evaluate its counter narcotics programmes?

7. Was there a need, in your view, for formal state legislation in the form of the CNL in 2005?

8. Do you think that the CNL is meaningful and appropriate for Afghanistan as a means of investigating and prosecuting drug-related criminal offences?

Please give reasons for your answer

9. Is it appropriate for Afghanistan to have a codified counter-narcotics state law or would it be more meaningful for Afghans to rely on customary justice mechanisms?

10. What do you think are the benefits of the CNL and what are the problems with it?

11. Do you have any further comments on the CNL?

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